TRANSCRIPT OF RECORD.

Supreme Court of the United States.

No. [redacted]

EPHRAIM SIMON,

Appellant,

versus

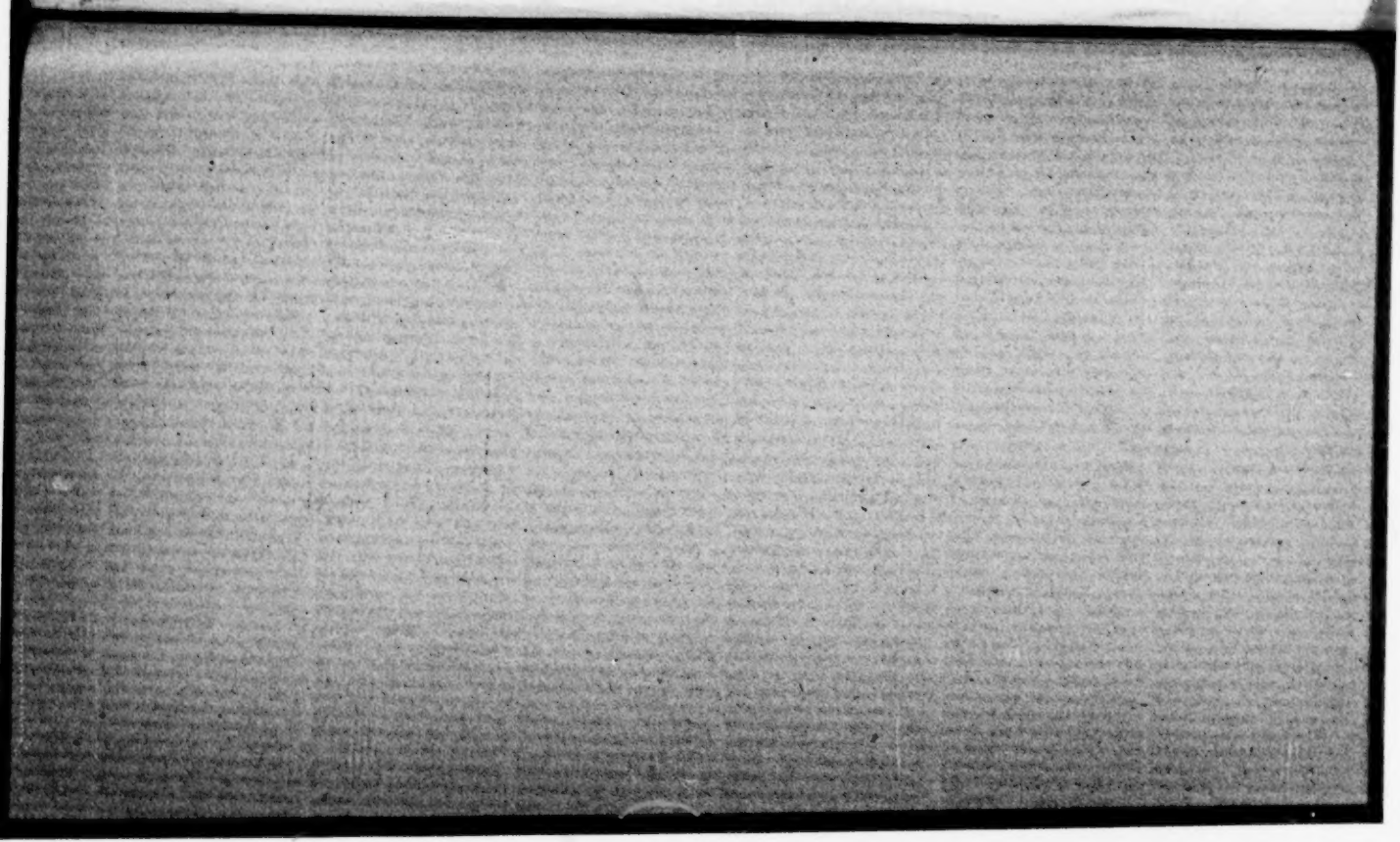
THE SOUTHERN RAILWAY COMPANY,

Appellee.

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

Office Supreme Court, U. S.
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UNITED STATES OF AMERICA,

UNITED STATES CIRCUIT COURT OF APPEALS

FIFTH JUDICIAL CIRCUIT.

PLEAS AND PROCEEDINGS had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on the third Monday in November, A. D. 1911, at New Orleans, Louisiana, before the Honorable A. P. McCormick, and the Honorable David D. Shelby, Circuit Judges, and the Honorable Thomas S. Maxey, District Judge.

EPHRAIM SIMON

Appellant

versus

THE SOUTHERN RAILWAY COMPANY

Appellee

BE IT REMEMBERED, That heretofore, to-wit:—on the Twelfth day of January, A. D. 1911, a transcript of the record of the above styled cause, pursuant to an appeal from the Circuit Court of the United States for the Eastern District of Louisiana, was filed in the office of the Clerk of said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript of the record was filed and docketed in said Circuit Court of Appeals as No. 2168, as follows:—

UNITED STATES CIRCUIT COURT OF APPEALS

FIFTH CIRCUIT

No. 2168

EPHRIAM SIMON,

Appellant,

vs.

THE SOUTHERN RAILWAY COMPANY,

Appellee.

Appeal From the Circuit Court of the United States for the Eastern District of Louisiana.

(ORIGINAL RECORD FILED JANUARY 12, 1911.)



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United States Circuit Court of Appeals

FIFTH CIRCUIT.

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United States of America.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana, New Orleans Division.

THE SOUTHERN RAILWAY COMPANY,

Appellee,

versus No. 13,300.

EPHRAIM SIMON,

Appellant.

Lazarus, Michel & Lazarus, Esqrs., and David Sessler, Esq., for Ephraim Simon, Appellant.

Harry H. Hall, Esq., for the Southern Railway Company, Appellee.

Appeal from the United States Circuit Court for the Eastern District of Louisiana, New Orleans Division, to the United States Circuit Court of Appeals for the Fifth Circuit, returnable within thirty (30) days from the fourteenth (14th) day of December, A. D. 1910, at the City of New Orleans, State of Louisiana.

TRANSCRIPT OF APPEAL.

1 Bill of Complaint. Filed February 6th, 1905.

United States Circuit Court, Eastern District of Louisiana.

No. 13300.

Southern Railway Company

vs.

Ephraim Simon.

Circuit Court of the United States, Fifth Circuit, Eastern District of Louisiana. In Equity.

To the Honorable the Judges of the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana:

The Southern Railway Company, a corporation duly organized and existing under and by virtue of the Laws of the State of Virginia and a citizen of the State of Virginia, having its

principal office in said State in the City of Richmond, and being a resident of the said City within the meaning of the Statute defining the jurisdiction of this Court, brings this its Bill of Complaint against Ephraim Simon, a resident of the City of New Orleans, State of Louisiana and a citizen of the said State.

And, thereupon, your Orator complains and says:

1. Your Orator is, and at all times mentioned in this Bill of Complaint was a corporation duly organized and existing under and pursuant to the Laws of the State of Virginia and is a citizen of the State of Virginia, and is and was at all times mentioned in this Bill of Complaint fully empowered to operate a line of Railway in said State of Virginia; in the State of Mississippi, and other States, but not in the State of Louisiana.

2. Ephraim Simon is and at all times mentioned, in said Bill of Complaint was a resident of the City of New Orleans, and a citizen of New Orleans in the State of Louisiana.

3. That, on or about the 8th. of February, 1904, the said Ephraim Simon was a passenger upon one of your Orator's trains and, when in the vicinity of York in the State of Alabama, there occurred between the train upon which the said Simon was a passenger and a train of the Alabama Great Southern Railway Company, a collision, in which collision both ankles of the said Simon were Slightly sprained he sustaining no other or further injury.

That notwithstanding the insignificance of the said sprains, said Simon presented to your Orator an exaggerated and untrue statement of his injuries, falsely claiming that he had been damaged, by reason of the said collision in the full sum of Five Thousand Dollars, of which amount he demanded payment of your Orator in full and complete satisfaction of all claims against it;

2 That your orator had said Simon's injuries examined by a surgeon who pronounced them slight, and that, thereupon, your Orator offered to the said Simon Three Hundred and Fifty Dollars, in full compensation of his said injuries, and claim;

That the said Simon refused to accept said $350.00 but considered and discussed the acceptance of $750.00, which was not

agreed to by Plaintiff's representative, and the matter was then temporarily left in abeyance with a view of having said Simon modify his demand, it being understood that negotiations were still pending and would probably result in an agreement of settlement;

4. That said Simon, however, instead of terminating said discussion and attempted adjustment by a refusal, but leaving your Orator in the belief that he was still considering and would submit a modified offer of settlement, surreptitiously, and without the knowledge of your Orator, entered against it in the Civil District Court for the Parish of Orleans, No. 74869 of its docket, a suit for damages sustained by him in the collision aforesaid, and instead of suing for the Seven Hundred and Fifty Dollars amount of suggested compromise or the Five Thousand Dollars the amount of his claim as made out and presented originally, he claimed in said suit to have sustained damages in the full sum of Thirteen Thousand three hundred and forty-eight Dollars, falsely and fraudulently pretending that he had been injured in that sum, by reason of the collision aforesaid. Your Orator avers that he sets out the damages thus falsely alleged to have been sustained by him as follows:

Physical and mental anguish	$5000.00
For loss of profit to his business	4000.00
For deterioration of stock	3000.00
For extra cost of manufacturing stock	1000.00
For nurses, medicines, etc	250.00
For physician's services	98.00
	$13,348.00

5. That said suit was entered in the Civil District Court for the Parish of Orleans, and a citation issued therein and was served on the Assistant Secretary of the State of Louisiana on December 3rd, 1904, said Simon maintaining that your Orator was a Foreign Corporation doing business in the State of Louisiana, which had not filed in the office of the Secretary of State a written declaration setting forth the locality of its domicile and the place or places in this State where it is doing business, and had failed to name an agent upon whom process might be served,

and claiming that, by reason thereof and by virtue of Act No. 54 of 1904 of the Acts of the General Assembly of the State of Louisiana, he was, in such case and by reason of such omission, justified in serving said citation on the said Secretary of State.

6. Your Orator avers that it is not a Foreign Corporation doing business in the State of Louisiana, and that none of its lines of Railway enter or traverse any part of the said State.

3 And your orator avers that the attempted service of said citation upon the Secretary or Assistant Secretary of State of Louisiana, was not a citation upon your Orator, and is absolutely null and void for the purpose of bringing it under the jurisdiction of the said Civil District Court.

Your orator avers that even if it could be construed to have been the intention of the General Assembly of the State of Louisiana, in enacting said Act 54 of 1904, to permit suit to constrain a Foreign Corporation engaged, as is your Orator, in Interstate Commerce, to be impleaded in the Courts of this State, when it is not transacting business within the limits thereof and has no agent therein, such an Act would be an attempted regulations [egulation] of Interstate Commerce and in violation of the Constitution of the United States.

And your Orator further avers that any judgment rendered, upon such attempted citation, would be, if rendered without appearance of the defendant, a judgment without due process of law, and consequently, in violation of said Constitution.

7. That on the 10th day of January, 1905, said Simon caused to be entered a default in the above referred to proceeding and, on the 16th day of January, 1905, caused to be impaneled a jury, and caused to be confirmed said default, and fraudulently caused to be entered by said jury a verdict of $13,348.00 (Thirteen Thousand Three Hundred and Forty Eight Dollars), against said Orator which verdict was subsequently embodied in a judgment of the said Civil District Court.

8. Now your orator avers that in confirming the said default, the said Ephraim Simon was guilty of subterfuge and fraud in claiming and adducing testimony to the effect that he had sustained damages in the sum of $13348.00 as above detailed,

he knowing full well that his claim, as originating with himself and before discussion or suggestion of compromise was for Five Thousand Dollars, the total damage, which he pretended to have sustained or suffered by reason of said collision, and he having been apparently willing to accept, after discussion, one half of that sum.

And your orator avers that the claim for loss of profit, deterioration of stock, extra cost of manufacturing stock, are claims that said Simon well knew and knows were and are fraudulent, fictitious and utterly untrue, and even if true would be such remote and consequential damages as could not be recovered.

9. Your Orator avers that it has never received from the Secretary of State the above referred to citation issued out of said suit No. 74869 of the Civil District Court for the Parish of Orleans, nor was it advised, nor had it any knowledge of the pendency of said proceedings, until after the rendition of said judgment.

That immediately upon receipt of said advice, your Orator's Assistant General Counsel left the City of Washington, and immediately proceeded to the City of New Orleans, to investigate the matter of this proceeding, and thereupon promptly retained Counsel to bring this Bill of Complaint.

10. Your Orator avers that the verdict of the Jury and the judgment of the Civil District Court, as above set out,
4 are unconscionable as having been rendered fraudulently and upon false testimony, and without due and proper citation or notice to your Orator; and that it would be against good conscience to allow said judgment to be used to extort money that is not owing from your Orator, which has no remedy at law in the premises and which has a complete meritorious defense to the claim on which the said judgment is based.

11. And your Orator avers that it was prevented from availing itself of its defense to the cause of action embodied in said proceeding by the accident or failure of its not receiving from said Secretary of State any citation or notice of said proceeding, and that it has been without negligence either of itself or its agents in the premises.

Your Orator avers that this Court has plenary jurisdiction to restrain the enforcement of such judgment, to which your orator has a meritorious defense, which it was prevented by fraud and accident, unmixed with its own negligence from adducing.

12. Your Orator avers that unless prevented and restrained, the said Ephraim Simon will attempt to collect said fraudulent judgment and will cause to be issued thereon, out of the Civil District Court, a writ of fieri facias, under and by virtue of which he will attempt to seize your Orator's property and thereby cause it continuous and irreparable injury.

And your Orator avers that it is informed and verily beli-ves [believes] that such action is about to be taken by the said Ephraim Simon, and that it is entitled to a writ of injunction and restraining order to prevent such action.

Your Orator annexes & makes part of this bill a copy of the said record in the State Court & a letter from the Secretary of State marked Exhibit "A" & Exhibit "B."

In consideration whereof and for as much as your Orator is remediless in the premises and by the strict rules of the common law, and is only relievable in a Court of Equity where matters of this kind are cognizable, and relievable, your Orator therefore prays that the said Ephraim Simon who is Plaintiff, as aforesaid, in said action at law, entitled Ephraim Simon vs. the Southern Railway Company No. 74869 Civil District Court for the Parish of Orleans, his Counselors, Attorneys, Solicitors or agents may be restrained by an injunction issuing out of this Court from further proceedings against your Orator, under the said suit and judgment, or from issuing execution thereon, or attempting thereunder to seize any property movable or immovable of your Orator, or in any manner attempting to enforce the same.

May it please your Honors to grant unto your Orator not only said writ of injunction, but also a writ of subpœna of the United States of America, issued out of and under the seal of this Honorable Court, directed to said Ephraim Simon therein and thereby commanding him on a certain day therein to be named, and under a certain penalty to be there and answer all and singular, (but not under oath, which is hereby expressly

waived), the premises and to stand to, perform and abide by such order direction and decree as may be made against him in the premises and that the said injunction be made perpetual, and for such further general and equitable relief as may seem meet and agreeable to equity and good conscience.

And your Orator as in duty bound will ever pray & etc.

(Signed) SOUTHERN RAILWAY CO.,
" By H. H. HALL, Att'y.
" HARRY H. HALL, Solicitor.

United States of America, District of Columbia:

A. B. Andrews, being duly sworn, deposes and says that he is the First Vice President of the Southern Railway Company, complainant herein; that he has read the foregoing Bill of Complaint, and that the same is true to his knowledge, in so far as the citizenship and conduct of business of complainant is stated; and that in so far as the other matters alleged, he has no personal knowledge as to same beyond the official records and official statements made to him, but that they are true to the best of his information and belief.

(Signed) A. B. ANDREWS.

Sworn to and subscribed before me, this the 31st day of January, 1905.

(Signed) PEARCE HORNE,
[Seal] Notary Public.

Let defendant show cause on Saturday February 11th, at 11 o'clock A. M. before this Court why a preliminary injunction should not issue herein & in the meantime let a temporary restraining —— issue herein restraining & forbidding the said defendant from proceeding against Complainant under said suit & judgment or attempting to enforce the same.

New Orleans, Feb'y 6th, 1905.

(Signed) CHARLES PARLANGE,
U. S. Judge.

Transcript of Removal from Civil District Court Marked
6 Exhibit "A." Filed Feb. 6, 1905, with Bill.

United States Circuit Court, Eastern District of Louisiana.

No. 13300.

Southern Railway Company

vs.

Ephraim Simon.

Petition. Filed December 1st, 1904.

Civil District Court, Division "D."

No. 74869.

Ephraim Simon

vs.

Southern Railway Co.

To the Honorable the Judges of the Civil District Court for the Parish of Orleans:

The Petition of Ephraim Simon a citizen of the State of Louisiana and a resident of the parish of Orleans, with respect represents:—

That the Southern Railway Company, a corporation organized under the laws of the State of Virginia, and doing business in the City of New Orleans, is justly and truly indebted unto your petitioner in the sum of Thirteen thousand three hundred forty eight ($13,348.00) Dollars, with legal interest thereon, from judicial demand, for this, to-wit:

That your petitioner on the 8th day of February 1904, purchased and paid for a first-class ticket for passage, entitling him to safe transportation from Selma, Alabama, to Meridian, Missis-

sippi; that, under the regulations of the defendant company, in the operation and the movement of its trains, your petitioner boarded Train No. —— leaving the town of Selma, on Monday, February, 8th, 1904, at about the hour of 4:45 P. M.; that said Company operates a single track between Selma and Meridian, with all necessary turn-outs and sidings, and when the movements of the trains are intelligently and carefully directed, it insures to the travelling public reasonable safety in transportation that the said Southern Railway Company is a system of railways embracing, within its control and direction, the Alabama Great Southern Railway Company, being a subordinate part of the system known as the Queen & Crescent System,—and all of which are under the immediate direction and control of the management of the said Southern Railway System.

7 Petitioner further represents that on the 8th, of February, 1904, while he was a passenger on one of the trains of the said Southern Railway Ssystem, as aforesaid, and without his fault, but through the gross and criminal negligence of the officers and employees of the said Southern Railway System and its subordinate Companies, in their failure to take all reasonable and proper precautions to avoid injuries resulting from collisions or other causes, and in their failure to protect and guard the safety of the passengers patronizing said system, a collision occurred at or near the town of York, in the State of Alabama, between the hours of 7:00 and 8:00 P. M., which collision resulted disastrously to your petitioner, inflicting upon him great personal injuries, and financial losses in consequence thereof, as hereinafter more particularly recited.

Petitioner represents that he is a merchant and manufacturer doing business in the City of New Orleans; that, by his own independent efforts, he had established a business, which, in its results, was profitable; that he does his own purchasing; that he directs and supervises, personally and exclusively, his manufacturing, and, at regular intervals, personally solicits from the trade in neighboring states their accounts and orders for the seasons' goods; that, in his solicitation of business, he exhibits to the trade the various styles of the seasons for which he solicits their orders, and, having the unmanufactured material on hand, he directs and supervises the manufacture of the goods, as ordered.

Petitioner further represents that the business for the spring trade is sought after and solicited in the early winter months of the year; that it is necessary, in order to be prepared to accept and fill orders, samples of which are exposed to the trade, that a large stock of unmanufactured merchandise or raw material should be purchased in advance or held in stock for manufacturing purposes, as orders are received.

Petitioner represents that in pursuance of his business customs, and the customs pursued by manufacturers engaged in the same line of business as that carried on by your petitioner, after having purchased a stock of raw material, as aforesaid, with a sample of the styles prepared for the Spring and Summer trade of 1904, as aforesaid, your petitioner prepared for and already, in fact, began his spring trip among the trade with whom he had previously dealt, and with a view of enlarging the business conducted by him, in soliciting orders from others dealing in his manufactured product.

That your petitioner's business covered a large territory embracing the states of Tennessee, Alabama, Georgia, Arkansas, Mississippi, Louisiana and Texas; that he left New Orleans early in January 1904, going directly to the town of Alexandria, Louisiana, and that on said trip your petitioner visited Alexandria, Shreveport and Monroe, Louisiana; Marshal [Marshall], Texas; Memphis, Tennessee; Little Rock, and Pine Bluff, Arkansas; Macon, Columbus and Augusta, Georgia; and Mobile, Montgomery, Greenville and Selma, Alabama; that, leaving Selma, Alabama, on the night of February 8th, 1904, your petitioner was on his way to Meridian, where he had customers awaiting his arrival and from whom petitioner would, as he believes,

8 have secured orders and an opportunity to solicit further orders from others than his regular customers, for the Spring and Summer trade; that, in consequence of the accident and of the injuries received, your petitioner was deprived of the advantage of visiting and soliciting from his trade in other localities, their business for the Spring and Summer, of 1904, and the orders which he believes he would have secured, based upon past business with said various firms, and, more particularly, those residing and doing business in Meridian, Summit, Vicksburg, Ellisville, Brookhaven, Greenwood, Natchez, Jackson, Canton, Minniola and Greenville, Miss., as well as from those do-

ing business at Crowley, Opelousas, Lake Charles and Baton Rouge, Louisiana, and those doing business in Beaumont, Calvert, Greenville, Houston, Waco, Terrell, Bryan and Dallas, Texas; as also the trade which he had in Pensacola, Florida.

Petitioner further represents that, because of his inability, in consequence of his injuries hereinbefore and to be hereinafter recited, he was physically unable to secure the business to which he was entitled, and which he had reason to believe he would have secured, had he been able, personally, to call upon the trade with whom he had previously dealt, and which would have advantaged him in the legitimate profit which he would have earned, in a sum exceeding Four Thousand ($4,000.00) Dollars, as will be made evident upon the trial of the cause,—inasmuch as your petitioner received no orders from any of the localities that he did not visit; and, since his partial recovery from the injuries complained of, he has been enabled to travel over the identical territory referred to, and has renewed his business relations with the parties with whom he had theretofore dealt, and increased his business in securing new and additional customers and additional orders, as a result thereof.

Petitioner further represents that, at the time of the accident resulting in the injuries hereinbefore and hereinafter complained of, your petitioner had on hand a stock of merchandise of a value in excess of Ten Thousand ($10,000.00) Dollars, and which was purchased for manufacture upon orders secured upon the quality of the goods exhibited and the samples of style of the articles to be manufactured; that the class of merchandise referred to was of that season's style and for that season's sale; that, in consequence of the injuries complained of—petitioner being unable to secure orders,—the said merchandise was left in an unmanufactured state, and in a manufactured state, which he could not sell, and resulted in a deterioration and loss to your petitioner of Three Thousand ($3,000.00) Dollars;—the said merchandise, after the season had passed for which it was purchased and manufactured being of a value of at least Thirty-three (33%) per cent. less than its original cost.

Petitioner further represents that orders that were obtained by him prior to the injuries sustained in consequence of the accident aforesaid, were manufactured, but not under his direct

supervision; that manufacture, therefore, being without his personal attention, in consequence of the injuries sustained and his disability to supervise their manufacture; that, as a re-
9 sult thereof, the cost of the manufacturing was greater than would have resulted, had petitioner been able to give the conduct of his business his personal attention; and, in consequence thereof, he has sustained additional loss in a sum exceeding One thousand ($1,000.00) Dollars.

Now, petitioner further represents that the injuries sustained by him, as aforesaid, in consequence of the acts of the defendant and its employes, are of a permanent character; that, prior to the event herein complained of, your petitioner was in the enjoyment of good health, vigorous and active; that he is forty-eight (48) years of age, and has dependent upon his [him] a wife, and, for maintenance, support and education, four (4) children, of the ages, respectively of eighteen (18) years, eleven (11) years, nine (9) years and four (4) years; that, seated in the car assigned to him by defendant's agents for safe transportation from Selma to Meridian, in consequence of the collision, your petitioner's ankles were severely sprained, and the ligaments of his legs lacerated and torn, so as to prevent the use of his limbs in locomotion, and compelling his carriage from place to place, until there had been a partial restoration, enabling petitioner to move upon crutches; that the shock to his system impaired his general health, and, during the period of time in which petitioner was under treatment, he suffered great pain and anguish, resulting from the injuries inflicted; that he was confined to his room for a period of Two (2) months, receiving constant professional medical attention and treatment, under a surgeon's direction; that he was unable, during the period aforesaid, to move from his couch and was, at all times when not confined to his bed, forced to sit in an upright position; that he could not move from place to place except by great effort and exertion, and that during the period aforesaid, he was deprived of giving his personal attention to the business conducted by him, as hereinbefore recited.

Petitioner represents that, although ten months have elapsed since the accident and injuries complained of occurred, petitioner is still suffering from the effects thereof, and is unable to pursue the course to which he was accustomed, of long walks, and, in changeable weather, he sustains great pain in his lower limbs,

and ankles and has not the full and free use of his limbs, as he had prior to the injuries of which complainant is here made.

Petitioner further represents that the pain and suffering which he underwent during the period aforesaid, and the permanent injuries that he believes will result from the injuries sustained, would not be, in consideration of his advanced age and prior activity, compensable in the sum of Five Thousand (5,000.00) Dollars.

Petitioner further represents that, during the period of his illness, in consequence of the injuries aforesaid, he had, in attendance upon his [him], a surgeon of reputation and ability in this community, whom he employs at an annual compensation for attention to himself and his family, and that he paid him, in addition thereto, the sum of Ninety-eight ($98.00) Dollars for extra services in his treatment, consequent upon the injuries received, and that he was called upon to employ, during the said period of treatment a trained nurce [nurse] and a masseuse, whom he compensated, and with other disbursements of minor detail, for bandages, ointments, salves, etc., your petitioner expended a sum exceeding, in amount, Two Hundred Fifty ($250.00) dollars,—a detailed memorandum of which will be produced upon the trial of this cause.

Petitioner further represents that the Southern Railway Company has admitted its liability in consequence of its negligent acts in the conduct and operation of its trains, in the respect herein complained of, and that it has only denied to your petitioner the payment of a fair measure of damages for the injuries thus negligently and wantonly inflicted.

Petitioner charges that the said Southern Railway Company has loosely and recklessly conducted and operated its road in the locality herein complained of, without a proper regard to the observance of those reasonable precautions which would insure safety to the traveling public.

Wherefore, the premises considered, your petitioner prays that the Southern Railway Company, defendant herein, be cited to appear in answer hereto, and that, it having failed to comply with the provisions of Section One of Act No. 54 of the Session of 1904, the service of process in this suit be made upon Hon. John T. Michel, Secretary of State, said service, so made, to be a service upon the said Southern Railway Company, as provided

for in the act aforesaid, and that, after the legal delays and due proceedings had, there be judgment in favor of your petitioner and against the said Southern Railway Company in the full sum of Thirteen Thousand Three Hundred Forty-eight ($13,348.00) Dollars, with legal interest thereon from judicial demand until paid.

Petitioner prays for trial by jury, and for costs and for general relief.

(Signed) HENRY L. LAZARUS,
Att'y for Pet'r.

(Signed) H. MICHEL,
HENRY RENSHAW,
Of Counsel.

A true copy.

(Signed) L. W. GUNTHER,
[Seal] Deputy Clerk.

11 Citation Issued to Defendant Through Secretary of State, December 2nd, 1904.

State of Louisiana:

Civil District Court for the Parish of Orleans, in the City of New Orleans.

No. 74869.

Ephraim Simon

vs.

Southern Railway Co.

To the Southern Railway Company, through Hon. John T. Michel, Secretary of State of Louisiana, New Orleans:

You are hereby summoned to comply with the demand contained in the petition of which copy accompanies this citation,

or deliver your answer to the same, in the office of the Clerk of the Civil District Court for the Parish of Orleans, within ten days after the service thereof.

Witness the Honorables T. C. W. Ellis, Fred D. King, Geo. H. Theard, John St. Paul, W. B. Sommerville, Judges of the said Court, this 2nd day of December in the year of our Lord 1904.

(Signed) L. W. GUNTHER,
Deputy Clerk.

Court-House Opposite Jackson Square.

[Seal.]

Sheriff's Return on Foregoing Citation.

Filed December 6th, 1904.

Received a certified copy of the within citation & petition on the 3rd day of December 1904 and on the 3rd day of December 1904 I served said copies on the within named Southern Railway Co. in the Parish of East Baton Rouge, State of Louisiana, by personal service on E. J. McGivney, Ass't Sec'y of State, Jno. T. Michel, Sec'y of State being absent at the time of service.

(Signed) W. J. MILLIGAN,
Deputy.

A true copy.

(Signed) L. W. GUNTHER,

[Seal.] Deputy Clerk.

12 Default Entered.

Extract From the Minutes of Division "D."

Tuesday, January 10th, 1905.

Present: The Honorable W. B. Sommerville, Judge.

On motion of H. L. Lazarus, attorney for Plaintiff and on showing to the Court that defendant has failed to answer though duly cited.

It is ordered by the Court that judgment by default be herein entered against said defendant.

Verdict of Jury Endorsed on Reverse of Petition.

We the jury find in favor of the plaintiff in the sum of Thirteen thousand Three hundred and forty-eight and 00/100 Dollars ($13,348.00) with interest & costs.

(Signed) SAMUEL MOHURTER,
Foreman.

A true copy.

(Signed) L. W. GUNTHER,
[Seal.] Deputy Clerk.

Judgment for Plaintiff. Rendered January 16th, 1905.

Civil District Court, Division "D."

No. 74869.

Ephraim Simon

vs.

Southern Railway Co.

Judgment.

This matter came on this day for trial by Jury on confirmation of Default entered against the Defendant on January 10th, 1905.

Present: H. L. Lazarus, H. Renshaw and H. Michael, Attorneys for Plaintiff.

Defendant absent and not represented.

And the following jury.

1. Samuel Mohurter
2. Fernando Escobedo
3. Robert L. Meyers
4. Sidney D. Perret
5. H. S. Patterson
6. Robert J. Downing
7. Wm. C. Neville
8. Chas. F. Davison
9. Geo. C. Frederichs
10. Wm. A. Mazarat
11. John A. Parody
12. Leonard Schayot.

13 When after hearing the pleadings, counsel and the testimony of the following named witnesses all duly sworn by the clerk on behalf of Plaintiff to-wit—Ephraim Simon

Dr. C. A. Gaudet, Geo. A. Wagatha, Gus Lehman, Gus Lehman Jr., Miss Eva Simon and Ephraim Simon recalled, the charge of the Court to the Jury, the case having been submitted the jury retired to deliberate.

The Court appointed Mr. Samuel Mohurter as Foreman of the Jury.

Thereafter the Jury returned into Court and through their foreman tendered the following as their Verdict.

"We the Jury find in favor of the Plaintiff in the sum of Thirteen thousand three hundred and forty eight 00/100 Dollars $13,348.00 with interest and costs.

(Signed) SAMUEL MOHURTER,
Foreman.

On motion of Counsel for Plaintiff said Verdict was ordered recorded and judgment entered in accordance therewith.

Considering the Verdict of the Jury in this matter, and that the demand of plaintiff was proved, and the law and the evidence being in favor of said Plaintiff.

It is ordered, adjudged and decreed that the Default herein entered on January 10th, 1905, be now confirmed and made final and accordingly that there be judgment in favor of the plaintiff Ephraim Simon and against the defendant Southern Railway Co., in the full sum of Thirteen thousand three hundred and forty eight ($13,348.00) Dollars, with legal interest thereon from date of judgment until paid and for costs.

Judgment rendered in open Court January 16th, 1905.

Judgment read and signed in open Court January 20, 1905.

(Signed) W. B. SOMMERVILLE,
Judge.

A true copy.

(Signed) L. W. GUNTHER,

[Seal.] Deputy Clerk.

Judgment Signed.

Extract from the Minutes of Division "D."

Friday, January 20, 1905.

Present: The Honorable W. B. Sommerville, Judge.

The judgment in this case was read and signed in open Court this day.

A true copy.

(Signed) L. W. GUNTHER,

[Seal.] Deputy Clerk.

14 Exhibit "B." Filed February 6, 1905, with Bill.

United States Circuit Court, Eastern District of Louisiana.

No. 13300.

Ephraim Simon

vs.

Southern Railway Company.

John T. Michel, Secretary of State.

State of Louisiana,

Department of State,

Baton Rouge, January 28th, 1905.

Mr. Harry H. Hall, P. O. Box 444, New Orleans, La.

Dear Sir: Replying to yours of the 27th inst., I beg to say that acting under the instructions of the Attorney General we simply filed the copy of citation and petition made on us in the

case of "Ephraim Simon versus The Southern Railroad Company, No. 74869 Civil District Court, Parish of Orleans," The said Company having failed to designate an agent upon whom service of process can be made as required by law.

Yours truly,

(Signed) EUGENE J. McGIVNEY,

Ass't Secretary of State.

Dic. MLS.

Restraining Order Issued to Ephraim Simon, & Marshal's Return.

United States of America:

Circuit Court of the United States, Fifth Judicial Circuit and Eastern District of Louisiana, New Orleans Division.

No. 13300.

Southern Railway Co.

vs.

Ephraim Simon.

The President of the United States to Ephraim Simon, Greeting:

Whereas, it has been represented unto us in our said Circuit Court on the part of The Southern Railway Company in a Bill in Equity lately exhibited against you touching certain matters and things therein set forth; and, Whereas, the Honorable Charles Parlange one of the Judges of our said Court, upon due consideration thereof, has made and allowed an order in said cause, whereby you are required to show cause on the 11th day of February 1905, at 11 A. M., why an injunction should not issue as prayed for in said Bill of Complaint; And, Whereas, the said Judge has granted and allowed an order restraining you immediately and forthwith and during the pendency of said motion for an injunction to the full extent and effect as prayed for in said Bill of Complaint.

Now, therefore, in consideration of the premises and of the allegations in said Bill contained, you, the said Ephraim Simon your agents, attorneys and servants, and each of you are hereby commanded and strictly enjoined under the penalty of the law, that you and each of you absolutely refrain and desist from further proceeding against complainant under the suit and judgment in said suit entitled Ephraim Simon vs. the Southern Railway Company No. 74869 Civil District Court for the Parish of Orleans or from issuing execution thereon, or attempting thereunder to seize any property movable or immovable of complainant or in any manner attempting to enforce the same. And that you the said Ephraim Simon your agents, attorneys and servants, and each of you, remain so inhibited and restrained until the further order of our said Court in the premises.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 6th day of February in the year of our Lord one thousand nine hundred and five.

(Signed) H. J. CARTER,

[Seal] Clerk.

[Endorsed:] U. S. Circuit Court, Eastern District of Louisiana, New Orleans Division No. 13300 The Southern Railway Company vs. Ephraim Simon Restraining Order.

Marshal's Return. Filed Feb. 6, 1905.

Received by U. S. Marshal New Orleans La. Feb'y 6/05 and on same day month and year I served copy hereof on Ephraim Simon by leaving same at his domicile in New Orleans La. in the hands of his wife Mrs. Jeannette Simon, a person apparently above the age of 14 years, at and residing at the domicile of said Ephraim Simon he being absent from home at the time of said service, all of which facts I learned by interrogating said Mrs. Jeannette Simon.

(Signed) VICTOR LOISEL,
U. S. Marshal.
By T. I. GALBRETH,
D'y.

Subpœna in Chancery Issued to Ephraim Simon, & Marshal's Return.

United States of America:

The President of the United States to the Marshal of the Eastern District of Louisiana, Greeting:

You are Hereby Commanded to summon Ephraim Simon to appear before the Honorable Judges of the Fifth Judi-
16 cial Circuit of the United States of America, at a Circuit Court to be holden on the first Monday of March 1905 then and there to answer a Bill in Chancery, filed against him wherein The Southern Railway Company — Com- [is] plaintiff and said Ephraim Simon is Defendant.

Herein Fail not, and have you then and there this writ, with your endorsement thereon, how you have executed the same.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 6th day of February in the year of our Lord one thousand nine hundred and five and 129th year of American Independence.

(Signed) H. J. CARTER,
Clerk.

[Seal.]

By ————,
Deputy Clerk.

The defendant is hereby notified that he is required to enter his appearance in the Clerk's Office of the United States Circuit Court, on or before the first Monday of March 1905, otherwise the bill may be taken pro confesso.

(Signed) H. J. CARTER,
Clerk.

By ————.
Deputy Clerk.

[Endorsed:] United States Circuit Court, New Orleans Division. No. 13300. The Southern Railway Co. vs. Ephraim Simon. Subpœna in Chancery.

Marshal's Return. Filed Feb'y 6th, 1905.

Received by U. S. Marshal New Orleans La. Feb'y 6/05 and on the same day month and year I served copy hereof on Ephraim Simon by leaving same at the dwelling-house or usual place of abode of said Ephraim Simon in New Orleans La., in the hands of his wife Mrs. Jeannette Simon an adult person who is a member and resident in the family of said Ephraim Simon, he being absent from New Orleans at the time of said service.

(Signed) VICTOR LOISEL,
U. S. Marshal.
By T. I. GALBRETH,
D'y.

Marshal's Return on Copy of Order on Bill of Complaint.

Filed February 6th, 1905.

The Southern Railway Company

vs.

Ephraim Simon.

Received by U. S. Marshal, New Orleans, La., Feb. 6, '05 and on same day I served copy hereof on Ephraim Simon by leaving same at his domicile in New Orleans, La., in the hands of his wife Mrs. Jeannette Simon a person apparently above the age of 14 years, at and residing at the domicile of
17 said Ephraim Simon he being absent from home at the time of said service; all of which facts I learned by interrogating the said Mrs. Jeannette Simon.

(Signed) VICTOR LOISEL,
U. S. Marshal.
By T. I. GALBRETH,
D'y.

Order Continuing Rule for Injunction.

Extract from the Minutes.

November Term, 1904.

New Orleans, Saturday, February 11, 1905.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, District Judge.

No. 13300.

Southern Railway Company

vs.

Ephraim Simon.

By agreement of the counsel for the respective parties it is ordered that the rule for injunction be continued to Saturday February 18, 1905, at 11 A. M.

Order Continuing Rule for Injunction.

Extract from the Minutes.

November Term, 1904.

New Orleans, Saturday, February 18, 1905.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange District Judge.

No. 13300.

Southern Railway Co.

vs.

Ephraim Simon.

By agreement of counsel for the respective parties it is ordered that the rule for an injunction herein, be continued to Saturday February 25, 1905, at 11 A. M.

18 Demurrer. Filed Feb'y 25th, 1905.

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. 13300. In Equity.

Southern Railway Company

versus

Ephraim Simon.

Demurrer of Epraim [Ephraim] Simon, the Defendant, to the Bill of Complaint of the Southern Railway Company, the Above Named Plaintiff.

This defendant by protestation, not confessing all or any of the matters and things in the plaintiff's bill of Complaint contained to be true, in such manner and form as the same is therein set forth and alleged, doth demur to said bill, and for cause of demurrer, sayeth:

1st. That the said bill doth not contain any matter of equity whereon this Court can ground any decree, or give to the plaintiff any relief against this defendant.

2nd. That this Court is without jurisdiction to hear and determine this cause, inasmuch as the complainant seeks through the process of this Court to review a judgment of the State Court and to control by its process the proceedings of said State Court with reference to a final judgment rendered therein.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, the defendant doth demur thereto, and humbly demands the judgment of this Court whether he should be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

(Signed) HENRY L. LAZARUS,

For E. SIMON.

Ephraim Simon, being duly sworn, deposes and says; That the above demurrer incorporating a plea to the jurisdiction, is not interposed for delay.

(Signed) EPHRAIM SIMON.

Sworn to and subscribed before me this 25th day of February A. D., 1905.

[Seal] (Signed) H. MICHEL,
Not. Pub.

I, Henry L. Lazarus, Solicitor for Defendant, certify that in my opinion the foregoing demurrer is well grounded in point of law.

(Signed) HENRY L. LAZARUS.

19 Depositions for Defendant.

Deposition of Hon. Walter B. Sommerville. Filed February 25, 1905.

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. 13300. In Equity.

Southern Railway Company

versus

Ephraim Simon.

WALTER B. SOMMERVILLE, being sworn, says:

I am one of the judges of the Civil District Court for the Parish of Orleans, and preside in Division "D" of that Court.

The case of Ephraim Simon vs. Southern Railway Company, No. 74869 of the Civil District Court for the Parish of Orleans, was filed December 1, 1904; service of citation and copy of petition were served on the Secretary of State of Louisiana on December 3, 1904; a default was taken & entered January 10th, 1905; on January the 16th 1905, the default was confirmed & the case was tried by the jury before me, in the absence of de-

fendant from the Court. There was no haste or precipitancy in the trial. The jury was empaneled in the forenoon, and after the other business of my Division was gone through with, the case was taken up. Witnesses for the plaintiff were sworn and heard. I charged the jury, who then retired, and after consultation among themselves, rendered a verdict in the plaintiff's favor. I directed that judgment should be entered based upon the Verdict. This was on Monday January 16th, 1905.

Before signature of the judgment became due, Mr. Harry H. Hall was aware of the judgment and spoke to me on the subject. No application was made to me for a new trial, and the judgment was signed January 20th, 1905.

No application was made to me by the defendant in the case referred to for any relief from the judgment therein.

(Signed) W. B. SOMMERVILLE.

Sworn to and subscribed before me, this 9th day of February 1905.

(Signed) W. HY. ALLEN,
Dy. Clerk.

[Seal]

20 Deposition of Ephraim Simon. Filed February 25th, 1905.

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. 13300. In Equity.

Southern Railway Company

versus

Ephraim Simon.

EPHRAIM SIMON, being duly sworn, deposes and says:

That he is the defendant in the above numbered and entitled cause; that he was the plaintiff in the case of Ephraim Simon versus Southern Railway Company, instituted in the Civil District Court for the Parish of Orleans, numbered 74869 of the Docket of said Court, and which cause was heard before the Honorable W. B. Sommerville and a jury duly empaneled and

sworn, and the execution of which judgment is sought to be enjoined in these proceedings;

Deponent further says that on the trial of said cause, after having been duly sworn in the presence of the judge and the jury he testified in support of his demand and submitted himself to cross examination by both the Court and the jury, and that all statements made by him of his own knowledge were true in point of fact, and that those statements which the Court permitted to be made upon information and belief, he believed to be true; that the charge contained in complainant's bill that this deponent "falsely and fraudulently pretended that he had been injured in that sum by reason of the collision," is a willful, wanton and malicious attack upon his evidence and is untrue; that aside from and independent of deponent's testimony delivered as evidence in that cause, the case was, as deponent believes, established by the disinterested testimony of Gustave Lehmann, Sr., Gustave Lehmann, Jr., and Dr. C. A. Gaudet and others, and that they [the] jury composed, as your deponent is advised, informed and believes, of reputable citizens, and those deliberations were presided over by Honorable W. B. Sommerville, one of the judges of the Civil District Court for this Parish, found in favor of this deponent, and the Court decreed in its judgment that the claim of this deponent had been proved.

Deponent further says that the statement embodied in complainant's bill that this deponent presented to the complainant "an exaggerated and untrue statement of his injuries, falsely claiming that he had been damaged * * * in the sum of five thousand dollars, of which amount he demanded payment of your orator in full and complete satisfaction of all claims against it," is willfully, wickedly and maliciously false and untrue; that at no time from the date of the injury inflicted upon deponent, has he ever presented or demanded of said Southern Railway Company any sum of money or made any demand whatever except as recited in his petition which he filed in court and upon which the verdict of the jury and the judgment of the court were rendered.

21 Deponent further says that the statement in the bill that there was any tender of any amount or any discussion with reference to any settlement in any sum by the representatives of the plaintiff corporation, the Southern Railway

Company, and your deponent, is absolutely and unqualifiedly false, and that at no time was he personally offered, as stated in said bill of complaint, "three hundred and fifty dollars in full compensation of his said injuries" and the statement; "that the said Simon refused to accept said three hundred and fifty dollars but considered and discussed the acceptance of seven hundred and fifty dollars, which was not agreed to by plaintiff's representatives," are statements that are untrue, false and malicious; that he was approached on two separate occasions by people representing themselves to be representatives of the Southern Railway Company; that on the first occasion he declined to entertain any proposition looking to an adjustment in the absence of Henry L. Lazarus, his counsel, and that he referred the parties approaching him to his said attorney, to submit their proposition to his said counsel, and if an adjustment could be effected, to be made by and through him; that contemporaneously with the visit of the said representatives of the Southern Railway Company to your deponent, he advised by letter Henry L. Lazarus, his counsel in charge of his interests, that they had called on him and that he had referred them to said Henry L. Lazarus that at that interview there were present his daughter, Eva Simon, and his wife Jeanette E. Simon; that on that occasion there was nothing whatever said by the representatives of the Southern Railway Company nor by this deponent with reference to the quantum or measure of damages resulting from the injuries inflicted upon this deponent by the acts of the Southern Railway Company; that there was a second call on or about the 4 day of April 1904 of the representatives of the Southern Railway Company, or those who represented themselves to be its representatives, with a view to arranging if possible the damages sustained in consequence of the Southern Railway Company's acts; that again this deponent refused to discuss with them the measure of damages inflicted and the amount to which he was entitled therefor, and referred them to his counsel, Henry L. Lazarus, and contemporaneously therewith advised by letter said Henry L. Lazarus of the call by said company's representatives, and of deponent's direction to them to see said Henry L. Lazarus with reference to adjusting the damages resulting from the injuries by this deponent sustained; that there was nothing said either by those representing the Southern Railway Company or by this

deponent with reference to the amount of damages sustained in consequence of the injuries suffered, and at no time was it the subject of discussion or consideration between this deponent and the representatives of said Southern Railway Company; that even at the time of the interview last referred to, this deponent was not able to state with anything like definiteness, even to his attorney, what injuries he had sustained, and it was not until some time later that he put said Henry L. Lazarus, his counsel, in possession of the information upon which his suit was brought and prosecuted.

22 That the statement is made in the bill that this deponent "instead of terminating said discussion and attempted adjustment by a refusal, but leaving your orator in the belief that he was still considering and would submit a modified offer of settlement, surreptitiously and without the knowledge of your orator, entered against it in the Civil District Court for the Parish of Orleans, numbered 74869 of its Docket, a suit for damages sustained by him in the collision aforesaid, and instead of suing for the seven hundred and fifty dollars, the amount of suggested compromise, or the five thousand dollars, the amount of his claim as made out and presented originally he claimed in said suit to have sustained damages in the full sum of Thirteen thousand three hundred and forty-eight dollars falsely and fraudulently pretending that he had been injured in that sum by reason of the collision aforesaid;" that so much of said statement in said bill as charges that this deponent left the representatives of the Southern Railway Company or the Southern Railway Company under the belief that negotiations looking to an adjustment were pending and that they would probably result in an agreement of settlement, is absolutely and unqualifiedly false, and made wantonly and maliciously; that he at no time, and nowhere, and with no person, ever undertook to adjust or settle the amount of damages for the injuries inflicted, or led them to believe by any statement, representation or action upon deponent's part, that he would not assert his rights to recover the full measure of damages inflicted in consequence of complainant's conduct; and it is false and untrue to say in said complaint that this deponent "falsely and fraudulently claimed Thirteen thousand three hundred and forty-eight dollars instead of seven hundred and fifty or Five thousand dollars" when the fact and the truth is that

the damages sustained by deponent equals the amount for which this deponent sought recovery, and which right of recovery and the amount thereof was recognized both by the jury and the trial judge who presided over their deliberations.

Deponent further says that it is false, wanton and malicious to charge him with having caused to be empanelled a jury and to have fraudulently confirmed a default by the jury thus empaneled, and which verdict was subsequently embodied in the judgment of the Civil District Court; that he had nothing whatever to do with the allotment of the case in the Civil District Court; that he had nothing to do with the selection of the panel of jurors to try the cause; that he has no recollection of knowing any of the jurors personally who sat in judgment on his cause; that he is informed, advised and believes, and so avers the fact to be, that the jury empaneled to try his cause was the regular panel of jurors for the Civil District Court, and that it was ordered transferred from Division "A" by the Honorable T. C. W. Ellis, presiding, to Division "D" in which said cause was tried before the Honorable W. B. Sommerville, and from which panel the jurors after each juror was examined on his voire dire, were selected, and all of whom, as this deponent now remembers, testified they knew neither the plaintiff nor the defendant in the cause, and that they would try the case upon the evidence that
23 was administered in the cause and before the Court, and give a verdict in accordance with the directions of the judge and in accordance with the law.

The statement that your deponent was guilty of "subterfuge and fraud" in claiming and adducing testimony to the effect that he had sustained damages in the sum claimed, is, so far as the charge of fraud is made, a wanton, false and malicious assault without justification in fact; as a matter of fact all the witnesses testifying in the cause in the presence of the court and the jury, and in the hearing of your deponent, testified to facts which were true to this deponent's knowledge, and upon which deponent was entitled to the award accorded him by the jury and proved to the satisfaction of the Court.

Your deponent further says that he was not advised, nor has he any personal knowledge of the fact, whether the service made upon the Secretary of State, the complainant's legal agent, was notified to it or not; he does not know the Secretary of State not [nor] his assistant, nor has he ever at any time, communicated

with him in reference to this cause other than through the processes of this Court, issued at his counsel's instance and for this deponent's benefit.

Your deponent further says that there was no undue haste, as appears from the Record, in the prosecution of this cause in the Civil District Court; that a long period of time was allowed to elapsed [elapse] before a default was taken, and additional delays accorded before its confirmation; that your deponent is advised, informed and believes, and so avers the fact to be, that the complainant, the Southern Railway Company, had notice in time to have prevented the signing of the judgment, and that there was no motion made for a new trial, nor was there any relief applied for to the State Court from the judgment herein complained of.

Further, deponent sayeth not.

(Signed) EPHRAIM SIMON.

Sworn to and subscribed before me this 25th day of February, A. D. 1905.

(Signed) H. MICHEL,

[Seal] *Not. Pub.*

Deposition of Henry L. Lazarus. Filed February 25, 1905.

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. 13300. In Equity.

Southern Railway Company

versus

Ephraim Simon.

HENRY L. LAZARUS, being duly sworn, deposes and says:

That he is by profession a lawyer and a solicitor in equity proceedings in this Court; that he has been in the active
24 practice of his profession for a period of upwards of thirty years; that as an attorney, he was retained and employed by Ephraim Simon to institute and prosecute on his behalf his claim for damages for injuries sustained by him in con-

sequence as deponent was informed, of the gross and criminal neglect of the Southern Railway Company in transporting for hire the said Ephraim Simon, the said cause of action being as stated in a petition prepared by this deponent and filed in the Civil District Court for the Parish of Orleans against the Southern Railway Company; and which cause was allotted to Division "D" of said Court, presided over by the Honorable W. B. Sommerville, and in which proceeding said Simon prayed for adequate relief, and among other things, for a trial by jury; that, after service of process, as appears by the Record, more than the legal delays elapsed before a default was taken, and more than the legal delays elapsed before its confirmation; that the cause was heard and determined by the judge in charge of the case and a jury duly empaneled and sworn, and the evidence administered upon the trial of the cause this deponent believes to have been in all respects true.

Deponent further says that as the attorney of Ephraim Simon, he endeavored to ascertain, by application to the office of the Secretary of State, whether the said Southern Railway Company had designated an agent in this State upon whom process could be served, and that he was informed that no such designation had been made by said Southern Railway Company; and that this deponent — advised that under the law the service should be made upon the Secretary of State, and upon due return thereof, the proceedings aforesaid were taken.

Deponent further says that immediately upon his being retained by Ephraim Simon to assert and prosecute his cause of action, as set forth in his petition in the Civil District Court aforesaid, he called upon said Simon for the data upon which to prepare said suit but that said Simon was not in a position then to advise him of the injuries sustained and the damages suffered in consequence of the acts of the said Southern Railway Company as aforesaid that it was some time later before this deponent came into possession of a full statement of the injuries suffered by said Simon and the damages caused him in consequence thereof, and that owing to the approaching vacation of the Court, your deponent delayed bringing this action although repeatedly requested so to do by said Simon; that the delay was in consequence of the pressure of other business entrusted to this deponent, and it is not in any manner attributable to said Ephraim Simon.

Deponent further says that he was advised by letter of said Ephraim Simon which he annexes to his deposition as an exhibit, bearing date of March 3rd, 1904, that one J. C. Andrews and another person claiming to represent the Southern Railway Company, called upon him and stated that they would send the company's physician to examine him; that the said Simon advised them of the physician in attendance upon him, and referred the representative of said company to your deponent as his attorney and that they said they would call upon this deponent all of which will more fully and at large appear by reference to the said letter of Ephraim Simon addressed to your deponent and marked for identification "Lazarus—1." That on the same day to-wit, March 3rd, 1904, but at a later hour, the said Andrews and the doctor of said railway company called upon the said Simon and examined his condition and attempted, so your deponent is informed and believes, to effect a compromise with the said Simon, but again the said Simon referred him to your deponent, this notwithstanding the said officials tried to insist upon an adjustment, all of which will more fully and at large appear by reference to the letter of Ephraim Simon addressed to your deponent, dated March 3rd, 1904, attached hereto as an exhibit and marked "Lazarus—2"; that your deponent has no independent recollection of the date on which the parties referred to in said letter called upon him, but that his memory is refreshed by the date of the letters aforesaid; that the said representatives of the Southern Railway Company did make an offer to your deponent of a nominal amount to compromise the claim of Ephraim Simon but which offer was not entertained by this deponent for an instant, and at the time this deponent so informed the representatives of said Railway Company and dismissed them with the statement that as soon as Simon was able to arrive at the measure of damages inflicted in consequence of the injuries sustained, suit would at once be instituted.

Deponent further says on April 4th, 1904, of which date he has no independent recollection except from the date of the letter, he received a letter from Ephraim Simon, advising him that the representatives of the railway company had called upon him and that he had referred the said representatives to this deponent to effect a settlement of his claim if possible, all of

which will more fully and at large appear by reference to the letter aforesaid, annexed hereto as an exhibit and marked "Lazarus—3"; deponent says that he recalls the visit of two gentlemen representing themselves as the representatives of the Southern Railway Company, who informed this deponent that they had approached Simon with a view to adjusting his claim for damages and that Simon had referred them to this deponent; that deponent and said representatives had a conference lasting probably fifteen minutes, in which they made a ridiculously low offer, but in excess of the amount originally offered; as deponent now remembers, their offer to settle Simon's claim for damages, was to pay him the sum of $750; this was at once declined and the statement made by this deponent that further negotiations were useless and that as soon as deponent was in possession of the data and information to frame a complaint against the Southern Railway Company, he would at once institute suit; deponent did not know at that time what measure of damages said Simon had suffered, but he did say prior to their offer of $750. and when pressed and solicited by them to submit a proposition, that if they would submit a proposition of $7500, and that would even in part indemnify Simon, deponent would advocate and urge its acceptance, but that deponent did not know at that time what measure of damages was; it
26 was a mere suggestion by deponent which prompted the offer by them of $750 as aforesaid, and which offer when made was at once rejected with the statement that suit would be instituted for the recovery of the full measure of damages sustained.

Deponent further says that the Southern Railway Company, complainant herein, is represented in the City of New Orleans and in the State of Louisiana by local agents; that he is informed, advised and believes, and so avers the fact to be, from testimony delivered in the Civil District Court in his hearing by L. S. Berg, that the terminals of what is known as the "Frisco System" are owned in equal parts by the "Frisco System" and the Southern Railway Company, & that deponent is informed & believes that Harry H. Hall, Esquire, and C. C. Harvey, are on the Board of Directors of said System representing the said Southern Railway Company's interests in said system, and that they were at the time of the institution of this suit, and the

Southern Railway Company is now, doing business in the City of New Orleans and the State of Louisiana.

Deponent further says that Harry H. Hall, Esquire, a solicitor of this Court, and appearing herein as Solicitor for the complainant informed this deponent that on Tuesday, the 17th day of January 1905, after having examined the Record in the suit of Ephraim Simon versus Southern Railway Company, he communicated the facts disclosed by the Record to the Solicitor or Assistant Solicitor of the Southern Railway, residing in Washington, District of Columbia; that in said communication he advised them of the rendition of the verdict and judgment aforesaid.

Deponent further says that the usual time for the transmission of a letter from New Orleans to Washington is less than forty hours and that in the usual course of business a letter mailed on Tuesday, January 17th, 1905, should have reached, and should have been delivered to, the party to whom it was addressed not later than 12 o'clock on Thursday, January 19th, 1905; that there was abundant time between the mailing of the letter and its receipt, as well as after its receipt, to have taken such proceedings in the State Court as to have suspended the signature to the judgment in said cause by a motion for a new trial, or even by application to the judge for time in which to present a motion for a new trial; that no action whatever was taken so far as this deponent is advised or as the Record discloses, and that said judgment was not signed until Friday January 20th, 1905, at the opening of Court on that day.

That no proceedings were taken by the said Southern Railway Company in the State Court which rendered the judgment herein complained of, so far as the records of this Court disclose and so far as your deponent is advised.

Further deponent sayeth not.

(Signed) HENRY L. LAZARUS.

Sworn to and subscribed before me, this 25th day of February, A. D. 1905.

(Signed) H. MICHEL,

[Seal.] Not. Pub.

27 Letter Attached to Deposition of H. L. Lazarus, Marked Lazarus 1.

Ladies' Underwear, Shirt Waists, and Skirts.
416 Chartres Street.

New Orleans, La., Mar. 3rd, 1904.

"Lazarus 1."
Mr. H. L. Lazarus, City.

Dear Sir: Mr. J. C. Andrews, of #704 Common St., and another gentlemen [gentleman] of the Southern Railroad Co., were here to-day. They stated that they would send the Company's physician here to examine me. I gave them the name of my physician, and also referred them to you, as my attorney, and Mr. Andrews, stated that he would call upon you.

I am in the same condition, as I was when you saw me last. Not yet being able to stand on my feet.

Yours respectfully,

(Signed) E. SIMON,
" Per E. E. S.

Letter Attached to Deposition of H. L. Lazarus, Marked Lazarus 2.

Ladies' Underwear, Shirt Waists, and Skirts.
416 Chartres Street.

New Orleans, La., Mar. 3rd, 1904.

Lazarus 2.
Mr. H. L. Lazarus, City.

Dear Sir: Mr. Andrews, a Railroad official, and the Railroads' doctor were here just now, (5 o'clock) the doctor examined my feet, and the official tried to make a compromise with me, but I referred them to you. The official tried to insist, but I would do nothing, but refer him to you. They stated that they would call you, and then see me.

Respectfully yours,

(Signed) E. SIMON,
" Per E. E. S.

28 Letter Attached to Deposition of H. L. Lazarus, Marked Lazarus 3.

Ladies' Underwear, Shirt Waists, and Skirts.
416 Chartres Street.

New Orleans, La., Ap'l 4, 1904.

Lazarus 3.
Mr. H. L. Lazarus, City.

Dear Sir: I have referred, the gentlemen who were here this evening from the Railroad Co. to you, to effect a settlement, if possible.

I am getting along nicely, but very slowly, and can walk with my crutches about a half a block, at most.

I write this to inform you of my present condition.

Yours respectfully,

(Signed) E. SIMON,
" Per E. E. S.

Deposition of Gustave Lehmann, Sr. Filed February 25, 1905.

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. 13300. In Equity.

Southern Railway Company

versus

Ephraim Simon.

GUSTAVE LEHMANN, SR. being duly sworn, deposes and says:

That he is a member of the commercial firm of A. Lehmann & Company, importers and wholesale dealers in dry goods in the City of New Orleans and that he is a director in the Whitney National Bank of New Orleans, and a resident of the City of New Orleans for the past thirty years.

That he is personally acquainted with Ephraim Simon, the defendant in the cause of Southern Railway Company, vs. Ephraim Simon, No. 13300 of the docket of the United States Circuit Court for the Eastern District of Louisiana; that he has known the said Ephraim Simon for a number of years; that in his dealings and transactions with the said Ephraim Simon he

has been in all things honorable and truthful and is a man of irreproachable character and worthy of the highest consideration; that said Simon us [is] engaged as a manufacturer in this City, and to deponent's knowledge from his business relations with him the said Ephraim Simon gives the business his personal attention; that he is his own buyer, and deponent
29 is advised informed and believes and therefore states, that the said Simon does exclusively his own traveling and soliciting for trade.

That deponent was called as a witness on the trial of the cause of Ephraim Simon versus Southern Railway Company, in the Civil District Court for the Parish of Orleans, which cause was tried by the Honorable W. B. Sommerville and a jury, and before them deponent testified on behalf of the said Ephraim Simon, and that the evidence delivered by deponent on the trial of the cause was in all respects true and were facts within the personal knowledge of deponent.

And further, deponent sayeth not.

(Signed) G. LEHMANN, Sr.

Sworn to and subscribed before me this 23rd day of February, A. D. 1905.

(Signed) G. LEHMANN, SR.

[Seal.] Not. Pub.

Deposition of Gustave Lehmann, Jr. Filed February 25, 1905.

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. —. In Equity.

Southern Railway Company

versus

Ephraim Simon.

GUSTAVE LEHMANN, JR., being duly sworn, deposes and says:

That he is a member of the commercial firm of A. Lehmann & Company, wholesale merchants and importers, doing business in the City of New Orleans.

That he was born here and has resided here all his life;

That he is personally acquainted with and knows well Ephraim Simon, defendant in this Court in the cause of the

Southern Railway Company vs. Ephraim Simon, No. — of the docket of the United States Circuit Court for the Eastern District of Louisiana;

That he has come in business contact with the said Ephraim Simon, either as the purchaser of his wares or as vendor of merchandise to the said Simon; that at all times he has found him honorable in his dealings and truthful in his statements; that he enjoys in the commercial world in which he moves an honorable record, and is worthy of the highest consideration; that he would accept any statement from the said Ephraim Simon without question;

That he was present during the progress of the trial in the Civil District Court in which said Ephraim Simon was plaintiff and the Southern Railway Company defendant, the said trial having taken place before the Honorable W. B. Sommerville and a jury empaneled to try the cause; that deponent
30 was a witness in said cause on behalf of said Ephraim Simon, and that his statements to the Court and to the jury were in all things true, and were statements of fact within deponent's personal knowledge.

And further, deponent sayeth not.

(Signed) GUS LEHMANN, JR.

Sworn to and subscribed before me this 23rd day of February, A. D. 1905.

(Signed) H. MICHEL,

[Seal.] Not. Pub.

Deposition of Herman Michel. Filed February 25, 1905.

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. 13300. In Equity.

Southern Railway Company

versus

Ephraim Simon.

HERMAN MICHEL, being duly sworn, deposes and says:

That he is an attorney at law practicing in the Courts of Louisiana and in the United States Courts; that he is associated in the practice of his profession with Henry L. Lazarus, and that

he was of counsel in the cause of Ephraim Simon versus Southern Railway Company, No. 74869, of the Docket of the Civil District Court for the Parish of Orleans;

That on the first day of December 1904, he presented to the Clerk of the Civil District Court, or one of his authorized deputies the petition in the above numbered and entitled cause; that the said cause was entered upon the general docket of the said Civil District Court under the title of Ephraim Simon vs. Southern Railway Company; that it was again entered upon Docket No. 4 to which the class of cases involving a certain amount is referred for docketing, and against said suit was entered at large upon said docket; that the said dockets of the Civil District Court are public records and open at all times during court hours to the inspection of the public; that there was no concealment upon the part of this deponent or his associates of the institution of the suit aforesaid; deponent further says that in the Daily Court Record, the said suit was listed and published; that all proceedings had in the cause were had in open court, and was present and assisted in the trial on the confirmation of the default before the judge and jury who heard and determined said cause.

Further, deponent sayeth not.

(Signed) H. MICHEL.

Sworn to and subscribed before me this 25th of February, 1905.

(Signed) WILLIAM ARDILL.

[Seal.] Not. Pub.

31 Deposition of Herman Weil. Filed February 25, 1905.

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. 13300. In Equity.

Southern Railway Company

versus

Ephraim Simon.

HERMAN WEIL being duly sworn, deposes and says:

That he is a member of the commercial firm of Kohn & Weil wholesale merchants in this City;

That he knows Ephraim Simon, the defendant in the above numbered and entitled cause, that his acquaintance with the said Ephraim Simon covers a period of several years; that he has had business transactions with him and that he has found him at all times honorable in his dealings and truthful in his statements; that deponent regards the said Ephraim Simon as a man of irreproachable character and entitled to the highest consideration.

Further, deponent sayeth not.

(Signed) HERMAN WEIL.

Sworn to and subscribed before me this 23rd day of February, A. D. 1905.

(Signed) H. MICHEL,

[Seal.] Not. Pub.

Deposition of Leon Schwartz. Filed February 25, 1905.

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. 13300. In Equity.

Southern Railway Company

versus

Ephraim Simon.

LEON SCHWARTZ, being duly sworn, deposes and says:

That he is a member of the Commercial Firm of Schwartz Bros. & Co., wholesale dealers in dry goods in this City; that he knows Ephraim Simon, the defendant in the above numbered and entitled cause that his acquaintance with the said Ephraim Simon covers a period of several years; that he has had business transactions with him, and that he has found him at all times honorable in his dealings and truthful in his statements; that deponent regards the said Ephraim Simon as a man of irreproachable character and entitled to the highest consideration.

Further, deponent sayeth not.

(Signed) LEON SCHWARTZ.

32 Sworn to and subscribed before me this 23rd day of February, A. D. 1905.

(Signed) H. MICHEL,

[Seal.] Not. Pub.

Deposition of Adolph Katz. Filed February 25th, 1905.

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. 13300. In Equity.

Southern Railway Company

versus

Ephraim Simon.

ADOLPH KATZ, being duly sworn, deposes and says;

That he is a member of the Commercial firm of S. J. Katz & Company, wholesale merchants, doing business in the City of New Orleans, that he is a director in the New Orleans National Bank of New Orleans;

That he knows Ephraim Simon, the defendant in the above numbered and entitled cause; that his acquaintance with the said Ephraim Simon covers a period of several years; that he has had business transactions with him and that he has found him at all times honorable in his dealings and truthful in his statements; that deponent regards the said Ephraim Simon as a man of irreproachable character and entitled to the highest consideration.

Further, deponent sayeth not.

(Signed) ADOLPH KATZ.

Sworn to and subscribed before me this 23rd, day of February, A. D. 1905.

(Signed) H. MICHEL,

[Seal.] Not. Pub.

Deposition of William Adler. Filed February 25, 1905.

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. 13300. In Equity.

Southern Railway Company

versus

Ephraim Simon.

WILLIAM ADLER, being duly sworn, deposes and says:

That he is president of the State National Bank of New Orleans; that he knows Ephraim Simon, the defendant in the above

numbered and entitled cause; that his acquaintance with the said Ephraim Simon covers a period of several years; that
33 he has had business transactions with him, and that he has found him at all times honorable in his dealings and truthful in his statements; that deponent regards the said Ephraim Simon as a man of irreproachable character and entitled to the highest consideration.

Further, deponent sayeth not.

(Signed) WILLIAM ADLER.

Sworn to and subscribed before me this 23rd day of February A. D. 1905.

(Signed) H. MICHEL,

[Seal.] Not. Pub.

Deposition of Charles A. Morgan. Filed February 25, 1905.

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. 13300. In Equity.

Southern Railway Company

versus

Ephraim Simon.

CHARLES A. MORGAN, being duly sworn, deposes and says;

That he is Vice-President of the State National Bank of New Orleans; that he knows Ephraim Simon, the defendant in the above numbered and entitled cause; that his acquaintance with the said Ephraim Simon covers a period of several years; that he has had business transactions with him and that he has found him at all times honorable in his dealings and truthful in his statements; that deponent regards the said Ephraim Simon as a man of irreproachable character and entitled to the highest consideration.

Further, deponent sayeth not.

(Signed) CHARLES A. MORGAN.

Sworn to and subscribed before me this 23rd day of February, A. D. 1905.

(Signed) H. MICHEL,

[Seal.] Not. Pub.

Deposition of Eugene Ellis. Filed February 25, 1905.

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. 13300. In Equity.

Southern Railway Company

versus

Ephraim Simon.

EUGENE ELLIS, being duly sworn, deposes and says;

That he is a member of the commercial firm of May & Ellis Importers, doing business in the City of New Orleans;

34 That he knows Ephraim Simon, the defendant in the above numbered and entitled cause; that his acquaintance with the said Ephraim Simon covers a period of several years; that he has had business transactions with the said Ephraim Simon and that he has found him at all times honorable in his dealings and truthful in his statements.

That deponent regards the said Ephraim Simon as a man of irreproachable character and entitled to the highest consideration.

Further, deponent sayeth not.

(Signed) EUGENE ELLIS.

Sworn to and subscribed before me this 23rd day of February, A. D. 1905.

(Signed) H. MICHEL,
Not. Pub.

[Seal.]

Deposition of Charles H. Culbertson. Filed February 25, 1905.

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. 13300. In Equity.

Southern Railway Company

versus

Ephraim Simon.

CHARLES H. CULBERTSON, being duly sworn, deposes and says:

That he is Vice-President and Cashier of the State National Bank of New Orleans;

That he knows Ephraim Simon, the defendant in the above numbered and entitled cause; that his acquaintance with the said Ephraim Simon covers a period of several years; that he has had business transactions with the said Ephraim Simon and that he has found him at all times honorable in his dealings and truthful in his statements;

That deponent regards the said Ephraim Simon as a man of irreproachable character and entitled to the highest consideration.

Further, deponent sayeth not.

(Signed) C. H. CULBERTSON.

Sworn to and subscribed before me this 23rd day of February, A. D. 1905.

(Signed) H. MICHEL,
Not. Pub.

[Seal.]

35 Deposition of G. Wagatha. Filed February 25, 1905.

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. 13300. In Equity.

Southern Railway Company

versus

Ephraim Simon.

G. WAGATHA, being duly sworn, deposes and says:

That he is an officer in the Branch Depository of the State National Bank of New Orleans;

That he knows Ephraim Simon, the defendant in the above numbered and entitled cause; that his acquaintance with the said Ephraim Simon covers a period of several years; that he has had business transactions with him, and that he has found him at all times honorable in his dealings and truthful in his statements;

That deponent regards the said Ephraim Simon as a man of irreproachable character and entitled to the highest consideration.

That on the trial of the cause before the Honorable W. B. Sommerville and a jury empaneled to try the same, in the Civil

District Court of the Parish of Orleans, deponent was a witness on behalf of said Ephraim Simon, and that his statements to the Court and to the jury were in all things true, and statements of fact were to deponent's personal knowledge.

Further, deponent sayeth not.

(Signed) GEO. A. WAGATHA.

Sworn to and subscribed before me this 23rd day of February, A. D. 1905.

(Signed) H. MICHEL,

[Seal.] Not. Pub.

Deposition of J. H. Curtin. Filed February 25, 1905.

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. 13300. In Equity.

Southern Railway Company

versus

Ephraim Simon.

J. H. CURTIN, being duly sworn, deposes and says:

That he is a citizen of Louisiana, residing in the City of New Orleans; that he knows Ephraim Simon, the defendant in the above numbered and entitled cause; that his acquaint-
36 ance with the said Ephraim Simon covers a period of several years; that he has had business transactions with the said Ephraim Simon and that he has found him at all times honorable in his dealings and truthful in his statements;

That deponent regards the said Ephraim Simon as a man of irreproachable character and entitled to the highest consideration.

Further, deponent sayeth not.

(Signed) J. H. CURTIN.

Sworn to and subscribed before me this 23rd day of February, A. D. 1905.

(Signed) H. MICHEL,

[Seal.] Not. Pub.

Deposition of S. E. Worms. Filed February 25, 1905.

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. 13300. In Equity.

Southern Railway Company

versus

Ephraim Simon.

S. E. WORMS, being duly sworn, deposes and says;

That he is president of the S. E. Worms Company, Ltd., conducting a wholesale business in the City of New Orleans;

That he knows Ephraim Simon the defendant in the above numbered and entitled cause; that his acquaintance with the said Ephraim Simon covers a period of several years; that he has had business transactions with him, and that he has found him at all times honorable in his dealings and truthful in his statements; that deponent regards the said Ephraim Simon as a man of irreproachable character and entitled to the highest consideration.

Further, deponent sayeth not.

(Signed) S. E. WORMS.

Sworn to and subscribed before me this 23rd day of February, A. D. 1905.

(Signed) H. MICHEL,
Not. Pub.

[Seal.]

37 Deposition of Felix Levy. Filed February 25, 1905.

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. 13300. In Equity.

Southern Railway Company

versus

Ephraim Simon.

FELIX LEVY, being duly sworn, deposes and says:

That he is a member of the commercial firm of Levy, Loeb & Company, wholesale merchants of the City of New Orleans;

That he knows Ephraim Simon, the defendant in the above numbered and entitled cause; that his acquaintance with the said Ephraim Simon covers a period of several years; that he has had business transactions with him and that he has found him at all times honorable in his dealings and truthful in his statements;

That deponent regards the said Ephraim Simon as a man of irreproachable character and entitled to the highest consideration.

Further, deponent sayeth ont.

(Signed) F. U. LEVY.

Sworn to and subscribed before me this 23rd day of February, A. D. 1905.

(Signed) H. MICHEL,

[Seal.] Not. Pub.

Deposition of Dr. C. A. Gaudet. Filed February 25, 1905.

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. 13300. In Equity.

Southern Railway Company

versus

Ephraim Simon.

C. A. GAUDET, being duly sworn, deposes and says:

That he is a practicing physician and surgeon for upwards of thirty years in the City of New Orleans;

That he has known Ephraim Simon, defendant in the above numbered and entitled cause for several years, and has been and is now the attending physician of said Ephraim Simon and his family;

That he was called upon professionally by said Simon to attend him as a physician and surgeon in the month of February,

1904, for injuries sustained by said Simon, and which he was informed was the result of an accident on the railroad
38 of the plaintiff company, of this fact, however, deponent has no personal knowledge; that the injuries sustained by the said Simon were serious, and required deponent's skill and attention for upwards of two months; that independent of the annual retainer which this deponent receives for professional attention in the treatment of ordinary cases of the family of Ephraim Simon and himself, there was an additional charge for professional surgical attention to the said Simon for the injuries hereinbefore recited;

That he has known the said Ephraim Simon for several years, and in all his dealings he has found him honorable and in all his statements truthful; and he is a man of irreproachable character;

That this deponent was called as a witness in the case of Ephraim Simon vs. Southern Railway Company, pending in the Civil District Court for the Parish of Orleans, which case was tried by the Honorable W. B. Sommerville, aided by a jury; that he heard the witnesses testify in the case, and that he heard Ephraim Simon testify, and independent of describing the pains which he suffered, and which deponent believes to be true because of the character of the injuries sustained, all statements made by Simon with reference to said injuries and the treatment thereof were, to deponent's knowledge true and correct; that all statements made by this deponent to the Court and jury were true, and those facts recited in the evidence of this deponent, were within his personal knowledge.

Further, deponent sayeth not.

(Signed) C. A. GAUDET,
M. D.

Sworn to and subscribed before me this 23rd day of February, A. D. 1905.

(Signed) H. MICHEL,
Not. Pub.

[Seal.]

Deposition of Eva E. Simon. Filed February 25, 1905.

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. 13300. In Equity.

Southern Railway Company

versus

Ephraim Simon.

EVA E. SIMON, being duly sworn, deposes and says:

That she is the daughter of Ephraim Simon, the defendant in this cause and who was the plaintiff in the trial of the cause of Ephraim Simon versus Southern Railway Company, No. 74869 of the Docket of the Civil District Court for the Parish of Orleans;

That she was called as a witness in said cause on behalf of plaintiff, and after having been duly sworn in open
39 Court and in the presence of the jury, testified as a witness in said cause; that all facts testified to by her were within her personal knowledge and were true.

Deponent further says that as a rule she conducts her father's correspondence; that the three letters annexed to the deposition of Henry L. Lazarus, were composed by her, two of which were typewritten and one of which is in her own writing; that they were written under the directions of her father at the time stated in said letters and on the dates thereof, and were sent at once to Henry L. Lazarus, her father's attorney.

Deponent further says that she was present at both interviews of the representatives of the Southern Railway Company when they were attempting and insisting upon an adjustment of Ephraim Simon's claim for damages against said railroad resulting from the accident upon its system of railroad and of which he complained; that on both occasions said Ephraim Simon declined to enter into any discussion or negotiations looking to the adjustment of his claim for damages against the said railroad; that he referred the parties addressing him in the interest of said Southern Railway Company to said attorney, informing them that said attorney alone could effect the adjustment; that on neither occasion was there any sum of money men-

tioned, and that the statement in the bill of complaint to which deponent's attention has been directed by Henry L. Lazarus that the sum of $350, or $750 or $5000 as the basis either of settlement or demand for compensation, is untrue in point of fact.

Deponent further says that at the time of the interviews hereinbefore referred to, her father was not in a position to state what effect of his injuries were or the measure of damages that he sustained; that that was only ascertained at a date much later, when the information which was the basis of the claim of her said father, was handed to Henry L. Lazarus, his counsel.

Further, deponent sayeth not.

(Signed) EVA E. SIMON.

Sworn to and subscribed before me this 25th day of February, A. D. 1905.

(Signed) H. MICHEL,

[Seal.] Not. Pub.

40 Hearing and Continuance of Rule for Injunction.

Extract from the Minutes.

November Term, 1904.

New Orleans, Saturday, February 25, 1905.

Court met pursuant to adjournment.

Present: Hon. Charles Parlange District Judge.

No. 13300.

Southern Railway Company

versus

Ephraim Simon.

This cause came on to be heard this day on the Rule for an Injunction.

Present: Harry H. Hall Solicitor for the complainant.

" Henry L. Lazarus solicitor for the Defendant.

Whereupon Counsel for the respective parties offered affidavits, and on motion of solicitor for complainant, stating he desired to examine the affidavits offered on behalf of defendant

and had not had an opportunity to do so, it was ordered that the hearing of the rule for injunction herein be continued for two weeks or until March 11, 1905, at 11 A. M.

Order Continuing Rule for Injunction.

Extract from the Minutes.

November Term, 1904.

New Orleans, Saturday, March 11, 1905.

Court met pursuant to adjournment:
Present: Hon. Charles Parlange, District Judge.

No. 13300.

Southern Railway Company

versus

Ephraim Simon.

By request of H. H. Hall solicitor for the complainant Counsel for defendant consenting.

It is ordered that the Rule for Injunction be continued to March 18 1905 at 11 A. M.

41 Motion & Order Continuing Case.

Extract from the Minutes.

November Term, 1904.

New Orleans, March 18, 1905.

Court met pursuant to adjournment:
Present: Hon. Charles Parlange District Judge.

No. 13300.

Southern Railway Company

vs.

Ephraim Simon.

On motion of H. L. Lazarus of Counsel for defendant, suggesting that H. H. Hall solicitor for complainant desires a continuance in this case,

It is ordered that this case be continued by consent to Wednesday March 22, 1905 at 11 A. M.

Order Continuing Application for a Preliminary Injunction.

Extract from the Minutes.

November Term, 1904.

New Orleans, Wednesday, March 22, 1905.

Court met pursuant to adjournment:
Present: Hon. Charles Parlange District Judge.

No. 13300.

Southern Railway Company

vs.

Ephraim Simon.

By agreement of Counsel for the parties.

It is ordered that the Application for a Preliminary Injunction be continued to Saturday March, 25. 1905, at 11 A. M.

42 Order Continuing Rule for Injunction.

Extract from the Minutes.

November Term, 1904.

New Orleans, Saturday, March 25, 1905.

Court met pursuant to adjournment:
Present: Hon. Charles Parlange District Judge.

No. 13300.

Southern Railway Company

vs.

Ephraim Simon.

On the application of Counsel for defendant.

It is ordered that the Rule for an Injunction herein, be continued to April 1, 1905, at 11 A. M.

Order Continuing Rule for Injunction.

Extract from the Minutes.

November Term, 1904.

New Orleans, Saturday, April 1, 1905.

Court met pursuant to adjournment:
Present: Hon. Charles Parlange District Judge.

No. 13300.

Southern Railway Company

vs.

Ephraim Simon.

By request of H. H. Hall solicitor for complainant suggesting, that counsel for defendant desires a continuance herein.

It is ordered that the Rule for an Injunction do [go] over by consent for 1 week.

43 Appearance. Filed April 3rd 1905.

U. S. Circuit Court, East. Dist. of La. In Equity.

No. 13300.

Southern Railway Company

vs.

Ephraim Simon.

To the Clerk of the United States Circuit — of the Eastern Dist. of La.:

Please enter my appearance as solicitor for Defendant in the above entitled cause.

(Signed) HENRY L. LAZARUS,
Solicitor for Def.,
Per D. S.

Apr. 3rd, '05.

Order Continuing Rule for Injunction.

Extract from the Minutes.

November Term, 1904.

New Orleans, Saturday, April 8, 1905.

Court met pursuant to adjournment:
Present: Hon. Charles Parlange District Judge.

No. 13300.

Southern Railway Company

vs.

Ephraim Simon.

By agreement of Counsel by request of solicitor for defendant, the rule herein is continued to April 15, 1905 at 11 A. M.

44 Order Continuing Rule for Injunction.

Extract from the Minutes.

November Term, 1904.

New Orleans, Saturday, April 15, 1905.

Court met pursuant to adjournment:
Present: Hon. Charles Parlange District Judge.

No. 13300.

Southern Railway Company

vs.

Ephraim Simon.

By consent of counsel for the respective parties with leave of the Court, the Rule for an Injunction herein is continued to April 29, 1905, at 11 A. M.

Motion and Order Continuing Rule for Injunction.

Extract from the Minutes.

April Term, 1905.

New Orleans, Saturday, April 29, 1905.

Court met pursuant to adjournment:

Present: Hon. Charles Parlange District Judge.

No. 13300.

Southern Railway Company

vs.

Ephraim Simon.

By agreement of counsel for the respective parties it is ordered that the motion for an injunction be continued to May 6, 1905 at 11 A. M.

45 COMPLAINANT'S EXHIBITS.

Exhibit B 1.

Affidavit of Dr. E. D. Martin. Filed May 6 1905.

United States Circuit Court.

No. 13300. In Equity.

Southern Railway Company

vs.

Ephraim Simon.

E. D. MARTIN, being duly sworn, deposes and says that he is and has been a practicing physician and surgeon in the City of New Orleans for many years:

That in March 1904, he examined Ephraim Simon having called to see him for the purpose of making a professional examination of injuries said to have been the result of a Railroad Accident:

That his ankles were badly swollen due apparently to a concussion received through the soles of his feet and while it was severe and obviously painful, the tissues of his feet and ankles and legs were not lacerated, nor were the tendons thereof in any manner ruptured, the very nature of the accident necessarily precluding such effect;

That affiant at the time, had no reason to believe nor has he now any reason to believe that the injury complained of would be of a permanent nature or cripple or disable said Simon.

(Signed) E. DENEGRE MARTIN.

Sworn to and subscribed to before me this 9th day of March, 1905.

(Signed) CHAS. ROSEN,
Notary Public.

[Seal.]

Exhibit C. 2.

Affidavit of F. E. Shumate. Filed May 6, 1905.

U. S. Circuit Court, Eastern District of La.

No. 13300. In Equity.

Southern Railway Company

vs.

Ephraim Simon.

Before me, the undersigned, Notary Public in and for the Parish of Orleans, State of Louisiana, personally appeared F. E. SHUMATE who being duly sworn, deposes and says:

I am Law Agent of the Southern Railway Company
46 and reside in the City of Dalton, State of Georgia, where I have my office. My duties are investigating and adjusting claims against the Southern Railway Company, for damages arising from or growing out of injuries to persons or property.

In pursuance of my duties and acting upon instructions from the Asst. Chief Law Agent of the Southern Railway Company, I went to New Orleans during the month of March, 1904, arriving

there on the morning of March 3rd, 1904, for the purpose of investigating as to the extent of certain injuries alleged to have been sustained by Mr. E. Simon, of 416 Chartres Street, in an accident to train No. 15 of the Southern Railway near York, Ala., upon which train he was a passenger; and to make settlement with him for his damages on account of the said alleged injuries.

I went to see Mr. Simon on the morning of said 3rd. day of March and I found him at his residence, which is also his place of business, at 416 Chartres Street, he was in his store, seated upon a chair and apparently conducting his business. He was complaining of both feet and ankles, and after some conversation with him, I asked him if he would allow Dr. Denegre Martin to make an examination of his injuries, and he said that he would, and later in the day, I returned to see him, accompanied by Dr. Martin, and Dr. Martin made an examination of his feet and ankles. After discussing the nature and extent of his injuries with Dr. Martin, I told Mr. Simon that I was there for the purpose of settling the matter with him, and started to discuss a settlement with him. He refused to discuss the matter with me, and referred me to Mr. H. L. Lazarus of 830 Common, whom he said he had employed to represent him, stating that Mr. Lazarus was his attorney and any settlement that was made would have to be made with him; that anything Mr. Lazarus did would be satisfactory to him and that he would make no settlement independent of him.

I then, in company with Mr. J. C. Andrews, called upon Mr. Lazarus at his office, and after being introduced by Mr. Andrews told him that I was the representative of the Southern Railway Company, and had been referred to him by Mr. Simon, and that I desired to discuss a settlement of Mr. Simon's claim with him. We discussed the matter at length and I finally asked Mr. Lazarus to make me a proposition of settlement but he insisted that I should make the proposition and I offered him $300.00. He replied that he would not accept if I made it as many thousands, and believing that there was no chance to settle the matter at that time, as he seemed to want more than I was willing to pay, I asked him to think the matter over and make the Company a proposition that would be fair and reasonable both to the Southern Railway Company and Mr. Simon and to submit such a proposition to me, and I would take it up with

the proper officials of the Railway Company, and give him an answer promptly. I made him no further proposition, and left him expecting a proposition to come from him, but no proposition of settlement was ever made to me. I reported my actions in the matter to Mr. Walter Kennedy, Asst. Chief Law Agent of the Southern Railway Company, who has handled the matter since.

(Signed) F. E. SHUMATE.

47 Sworn to and subscribed to before me, this 17th day of March, 1905.

(Signed) PURNELL M. MILNER,

[Seal.] Not. Pub.

Exhibit D. 3.

Affidavit of Walter Kennedy. Filed May 6, 1905.

United States of America,

District of Columbia, City of Washington, ss:

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. 13300. In Equity.

Southern Railway Company

versus

Ephraim Simon.

Affidavit of Walter Kennedy.

Personally appeared before the undersigned Notary Public in and for the District of Columbia, the affiant, WALTER KENNEDY, who having been duly sworn to speak the truth, the whole truth, and nothing but the truth, deposed, as follows:

I am Assistant Chief Law Agent of Southern Railway Company I reside and have my office in the City of Birmingham and State of Alabama. My duties are the supervising, investigating and adjusting of claims against Southern Railway Company for damages arising or growing out of injuries to persons or property.

In pursuance of my duties I made investigation of an accident resulting in the injury to One Ephraim Simon of 416 Chartres Street, New Orleans, La., who claimed to have had both ankles sprained while a passenger on train No. 15 of Southern Railway Company on the 8th day of February 1904, near York, Ala. This train collided with a freight train of Alabama Great Southern Railroad Company on that date.

On the 4th day of April, 1904, in company with Dr. E. D. Martin of No. 513 Canal Street, New Orleans, La. I called at 416 Chartres St. New Orleans, La. which place is the residence and place of business of said Ephraim Simon. Dr. Martin, at my instance, made a personal examination of the said Simon's feet and ankles, and after the conclusion of same I approached said Simon for a settlement of his claim for injuries. The said Simon declined to enter into any negotiation looking to a settlement of his claim, and referred me to one Henry L. Lazarus, whom he stated was his attorney, and who would conduct such negotiations looking to a settlement. Upon this reference I called on

48 the said Henry L. Lazarus at his office in the said City of New Orleans, La. I introduced myself to the said Henry L. Lazarus and stated to him my official connection with the said Southern Railway Company, and purpose of my visit, which was to settle the claim of the said Ephraim Simon against Southern Railway Company for personal injuries alleged to have been sustained as passenger on train of the said Southern Railway Company near York, Ala., February 8, 1904. The said Henry L. Lazarus after discussing the matter of Simon's claim for injuries as his counsel made a proposition to me for a settlement of the claim of Simon for the sum of $5,000.00. This proposition I rejected, stating to him that the Railway Company would not be willing to consider the settlement of this claim for such an amount. I discussed further with Mr. Lazarus the claim of Simon and argued to him that the sum of $5,000.00 was an excessive amount to pay for such a claim and endeavored to persuade him to modify his views and to reduce the figure. He, however remained firm in his demand, and declined to accept anything else than the sum of $5,000.00. In my discussion of the matter with him I agreed to pay to him on behalf of his client the sum of $750.00 but this offer was declined, and when I saw that a further discussion of the matter at that time would be of no

avail I left it in that condition with the hope that a conservative demand would be made by the said Lazarus. Mr. Lazarus during the whole discussion of the matter represented himself as Counsel for Simon and fully authorized to act for him and to make any settlement of the matter which he deemed best for his client. In my negotiations with Simon himself he referred me on all matters to Mr. Lazarus, as his Counsel, and stated that Mr. Lazarus, had full authority to conduct the negotiations for him.

And further affiant saith naught.

(Signed) WALTER KENNEDY.

Sworn to and subscribed before me this 3rd day of March, 1905.

(Signed) PEARCE HOME,

[Seal.] Notary Public in and for the District of Columbia.

[L. S.]

Exhibit E 4.

Affidavit of Walter Kennedy. Filed May 6, 1905.

U. S. Circuit Court, Eastern District of La. In Equity.

No. 13300.

Southern Railway Company

vs.

Ephraim Simon.

Affidavit of Walter Kennedy.

Personally appeared before me, the undersigned Notary Public, in and for the Parish of Orleans, State of Louisiana, MR. WALTER KENNEDY, who being duly sworn, deposes and says:

49 On the 4th of April, 1904, I called at No. 416 Chartres Street, defendant's place of business which has the appearance of a tailoring establishment or a shop where women's garments are made.

I found him sitting in his shop with his feet upon a chair. He was fully clothed as for the street with the exception of his shoes and socks. Carpenters were at work, tearing up and repairing the floor of his shop and garments were being made upon a table, and apparently he was engaged in the active supervision of his work.

(Signed) WALTER KENNEDY.

Sworn to and subscribed to before me this seventeenth day of March, 1905.

(Signed) PURNELL M. MILNER,

[Seal.] Not. Pub.

Exhibit G 5.

Affidavit of Dr. E. Denegre Martin. Filed May 6th, 1905.

U. S. Circuit Court, Eastern District of La.

No. 13300. In Equity.

Southern Railway Company

vs.

Ephraim Simon.

Affidavit of Dr. E. Denegre Martin.

Personally appeared before me, the undersigned Notary Public in and for the Parish of Orleans, State of Louisiana, Dr. E. DENEGRE MARTIN, who being duly sworn, deposes as follows:

In March, 1904, Mr. F. E. Shumate, Agent of the Southern Railway Company residing in Dalton, Ga., requested me to visit Mr. Ephraim Simon, defendant herein, for the purpose of examining the extent of his injuries; I did make such visit to a Mr. Simon in company with a Mr. Shumate and I found the said

Simon sitting in his store with his feet upon a chair and apparently directing the management of his business.

(Signed) E. DENEGRE MARTIN.

Sworn to and subscribed to before me, this 16th day of March, 1905.

(Signed) JULIAN B. HABANS,

[Seal.] Not. Pub.

50 Exhibit F 6.

Affidavit of Dr. E. Denegre Martin. Filed May 6, 1905.

U. S. Circuit Court, Eastern District of La.

No. 13300. In Equity.

Southern Railway Company

vs.

Ephraim Simon.

Affidavit of Dr. E. Denegre Martin.

Personally appeared before me, the undersigned Notary Public in and for the Parish of Orleans, State of Louisiana, DR. E. DENEGRE MARTIN, who being first duly sworn, deposes and says:

I have read the affidavit of Walter Kennedy and F. E. Shumate and in so far as the said affidavits state the presence of Ephraim Simon in his store upon the occasion, in question, of their visits and his occupation at those times, affiant corroborates the said affidavits;

Further, affiant says that he confirms and corroborates the affidavit of Walter Kennedy to the effect that Mr. Henry L. Lazarus made a proposition for the settlement of this claim of Simon for the sum of Five Thousand Dollars.

(Signed) E. DENEGRE MARTIN.

Sworn to and subscribed to before me, this 17th day of March, 1905.

(Signed) BUS. ROUEN,

[Seal.] Not. Pub.

Exhibit H 7.

Affidavit of J. C. Andrews. Filed May 6th, 1905.

U. S. Circuit Court, Eastern District of La.

No. 13300.

Southern Railway Company

vs.

Ephraim Simon.

JOHN C. ANDREWS, being sworn, says that he is by occupation a ticket agent, selling tickets in the City of New Orleans that all the tickets sold by him are furnished by the Louisville and Nashville Railroad Company, and that all of his correspondence and communications concerning the sale of tickets is with the said Louisville and Nashville Railway Company in the City of Louisville;

51 That many of said Louisville and Nashville Railroad tickets call for transportation over other lines of Railroad and as [as] far as the City of New York;

That many of the said tickets call for transportation over the lines of the Southern Railway Company, but none of the said lines are reached at a point nearer the City of New Orleans, than the City of Atlanta, in Georgia.

And affiant says that he has no further and other connection with the said Southern Railway Company except such as incidentally results from the sale of such tickets for transportation outside of and beyond the limits of the State of Louisiana, and that all the persons traveling on transportation thus sold by him are conveyed on trains of the Louisville and Nashville Railroad Company and no other, through and out of this State.

(Signed) J. C. ANDREWS.

Sworn to and subscribed to before me this 9th day of March, 1905.

(Signed) PURNELL M. MILNER,

[Seal.] Not. Pub.

Exhibit I 8.

Affidavit of H. H. Hall. Filed May 6, 1905.

U. S. Circuit Court, Eastern District of La.

No. 13300. In Equity.

Southern Railway Company

vs.

Ephraim Simon.

HARRY H. HALL, ESQ., being sworn, says that he is a member of the New Orleans Bar and has been retained as the Solicitor for the Complainant in the above entitled suit.

That, on or about the 17th day of January, 1905, affiant saw in one of the daily newspapers of this City or in the Court Bulletin a notice of the rendition of a verdict against the defendant in the case of Ephraim Simon vs. the Southern Railway Company, No. 74869 and that, on or about that morning, affiant examined the minutes of the Civil District Court of Division D, presided over by Judge Walter B. Sommerville, for the purpose of verifying the aforesaid publication;

That said Judge Sommerville called affiant to him and inquired if affiant represented, as its Counsel in this City, the Southern Railway Company, to which inquiry affiant replied by stating that he did not represent, as its Counsel in this City, the Southern Railway Company and that said Railway Company was not represented in this City by any Counsel or by
52 any agent; and that said Judge Sommerville was fully advised by affiant of the fact that said Southern Railway Company was entirely unrepresented, on or about the 17th day of January, 1905, and before the judgment in said cause and on said docket had been signed.

Further, affiant deposes and says that he was not authorized and empowered in any manner to represent said Southern Railway Company, at the time, in said proceedings or in any other legal proceedings, but that because of the reasons hereinafter set out, he, on the said 17th day of January, 1905, wrote to the Assistant General Counsel of said Southern Railway Company,

Col. W. A. Henderson in Washington, D. C., advising him of the fact of the rendition of the said verdict and judgment, and that thereupon, the said Col. Henderson came to the City of New Orleans, and calling at affiant's office, consulted with him relatively to the proposed filing of a bill in equity to restrain the said Simon from enforcing the aforesaid judgment, and that, after said consultation, the said Colonel Henderson, stating that it was not necessary for him to remain any longer in this City as he had business engagements elsewhere, requested affiant to prepare the bill upon the statements made to him by said Col. Henderson, and requested him to represent the said Southern Railway in this proceeding.

Affiant further deposes and says that the testimony in support of the aforesaid verdict in said Civil District Court was, as affiant is informed and verily believes not reduced to writing, by reason which intentional omission no relief could be had by appealing from this judgment to the Supreme Court of Louisiana.

Further affiant deposes and says that the Article of the Code of Practice No. 213 which formerly required the impanelling of a jury to assess the damages in suits similar to the one above referred to, was repealed by the Legislature of the State of Louisiana by Act No. 110 of 1902 and that, therefore, there was no necessity for submitting the issue to a jury rather than to the Court;

Further, affiant deposes and says that the New Orleans Terminal Company, copy of whose Charter is hereto annexed as part of said affidavit marked "Exhibit X" is the sole owner of the Terminals in this City known as Port Chalmette, and other Railway Terminals in this City of New Orleans, and that the Southern Railway Company is the owner of certain shares of stock of the said New Orleans Terminal Company, its interest in which and the resulting interest in the properties owned by said New Orleans Terminal Company, said Southern Railway Company to the best of affiant's knowledge and belief, acquired by reason of the development of the City of New Orleans as an important commercial and export point and in anticipation of a possible extention [extension] at some future day of the lines of said Railway Company into this City; and affiant says that the interest of the said Southern Railway Company in the said capital

stock is, as stated in the affidavit of Judge Lazarus, represented by C. C. Harvey Esq., and your affiant, upon the Board of Directors of the New Orleans Terminal Company;

Further, affiant deposes and says that the operations of the said New Orleans Terminal Company are conducted by
53 it and not by the Southern Railway or any other Railroad Company having an interest in said stock.

And that the said "Frisco Company" referred to in the affidavit of Judge Lazarus operates its trains into this city and uses the said Terminal property, but the said Southern Railway Company neither operates its trains into this City nor does it use the said Terminal property, nor to the best of affiant's knowledge and belief, does it transact business of any kind in this City, the freight and passengers originating upon its lines of Railway being brought into this City over the Louisville & Nashville R. R. and the New Orleans and Northeastern Railroad Company both of which are independent corporations neither owned nor controlled, in any manner, by the said Southern Railway Company.

———— ————.

Sworn to and subscribed to before me, this — day of March 1905.

(Signed) HARRY H. HALL.

Exhibit J 9.

Affidavit of W. W. Finley. Filed May 6, 1905.

U. S. Circuit Court, Eastern District of Louisiana.

No. 13300.

Southern Railway Company

v.

Ephraim Simon.

W. W. FINLEY being sworn says:

I am Second Vice President of the Southern Railway Company, the complainant herein:

I have read the affidavit of Harry H. Hall, Esquire, filed herein, and, so far as the same relates to the question of Southern

Railway Company transacting business in the City of New Orleans, said affidavit is true of my own knowledge. Southern Railway Company is the owner of certain shares of capital stock of New Orleans Terminal Company, but it does not own or operate any railroad in the State of Louisiana.

(Signed) W. W. FINLEY.

Sworn to and subscribed before me this 15th day of March, 1905.

(Signed) PEARCE HOME,

[Seal.] Notary Public, District of Columbia.

54 "Exhibit X."

Charter and Amendments of the New Orleans & San Francisco Railroad Company, now the New Orleans Terminal Company.

No. 13300.

Filed May 6, 1905.

(Signed) H. J. CARTER, Clerk.

Charter of the New Orleans & San Francisco Railroad Company.

United States of America,

State of Louisiana,

Parish of Orleans—City of New Orleans.

Be it known, that on this thirty-first day of the month of December, in the year of our Lord one thousand nine hundred and two, and of the Independence of the United States of America the one hundred and twenty-seventh,

Before me, Abraham Goldberg, a Notary Public in and for the Parish of Orleans, State of Louisiana aforesaid, and in the presence of the witnesses hereinafter named and undersigned,

Personally came and appeared the several persons whose names are hereunto subscribed, who severally declared that availing themselves of the laws of the State of Louisiana in such cases made and provided, they have covenanted and agreed and do

by these presents covenant and agree and bind themselves, as well as all such persons as may hereafter become associated with them, to form a corporation for the objects and purposes and under the articles and stipulations following, to-wit:

Article I.

The name of this corporation shall be "New Orleans and San Francisco Railroad Company," and under its said corporate name it shall have power and authority to have and enjoy corporate existence and succession for the full term and period of ninety-nine years from and after the date hereof; to contract, sue and be sued, to make and use a corporate seal, and the same to alter and break at pleasure; to hold, receive, lease, purchase and convey, as well as mortgage and hypothecate, property, real, personal and mixed, corporeal and incorporeal; to name and appoint such managers, agents, directors and officers as its business, interest and convenience may require, and to make and establish, as well as alter and amend, from time to time, such by-laws, rules and regulations for the proper government of the affairs of said corporation as may be necessary and proper.

55

Article II.

The domicile of said corporation shall be in the City of New Orleans, State of Louisiana, and all citations or other legal process shall be served upon the president of said corporation, or in the event of his absence, upon the vice-president thereof, and in the absence of both of said officers upon the secretary of said corporation.

Article III.

The objects and purposes for which this corporation is established, and the nature of the business to be carried on by it, are hereby declared to be to construct, or otherwise acquire, maintain and operate for the carriage of passengers, freight, mail and express matters, a main line of railway with one or more tracks from some point in or near the City of New Orleans, to

the northern or northwestern boundary of the State, and thence through the States of Arkansas, Missouri and Illinois to the City of Chicago, upon such lines as may hereafter be selected by the Company, with all necessary spurs, side tracks, switches, turnouts, water tanks, sand and gravel pits, stations, yards and depots, roundhouses, shops, coal chutes, warehouses, platforms, ferries, bridges and other adjuncts and appurtenances necessary, proper and convenient for the operation of said main line of railway; to locate, construct or otherwise acquire and operate, with all necessary appurtenances, connecting lines of railway from such points on said main line as the Company may select to other points in the State of Louisiana, or in any other State or Territory of the United States, or in the Republic of Mexico, or in the Dominion of Canada; to lease, or to sell, its lines of railways, in whole or in part, to other companies; to lease other railways in whole or in part; to purchase or consolidate with other railway corporations organized under the laws of the State of Louisiana or of any other State, or of the United States, and to acquire and hold the stocks, bonds and securities of such other railway corporations; to guarantee the stocks, bonds and securities of such railway corporations as it may be interested in; to construct and maintain passenger depots and freight yards, and to permit the use of such depots as union depots; to construct, own and operate steamships and other vessels for the carriage of freight and passengers for hire; to construct, own and operate docks and wharves for the landing of vessels and for the receiving, storing and forwarding of freight and the accommodation of passengers; to construct, own and operate warehouses, grain elevators and compresses; to store grain and other commodities for hire, and to compress and handle cotton for hire; to open and work mines; to establish telegraph and telephone lines, to establish electric plants and to generate and distribute electricity for hire, for light, heat and power purposes; to construct or otherwise acquire, maintain and operate canals for navigation; to develop generally the agricultural interests of the State of Louisiana and of the various States and Territories through which its main or connecting lines may run; and generally to hold and exercise all such incidental powers and privileges as relate to the objects hereinbefore set forth.

Article IV.

The capital stock of said corporation is hereby fixed at the sum of five million dollars ($5,000,000), divided into and represented by fifty thousand (50,000) shares of stock of the sum of one hundred dollars ($100) each. Said stock shall be paid for in cash, at such time, in such amounts and after such notice to the subscribers, as may be fixed by the Board of Directors, or the same may be issued at not less than par for labor done, or property actually received by the corporation.

The corporation shall become a going concern and be authorized to do business as soon as six thousand dollars ($6,000) of its capital stock shall have been subscribed for.

Article V.

All the corporate powers of said corporation shall be vested in and exercised by a Board of Directors to be composed of five stockholders, to be elected annually on the second Monday in February in each year, except the first board appointed in this charter, who shall hold their offices until the second Monday in February, 1904.

All such elections shall be held by ballot and conducted at the office of said corporation, under the supervision of three commissioners to be appointed by the Board of Directors.

Notice of such election shall be given by the Secretary of the Company by publication for not less than ten days prior thereto in a newspaper published in the City of New Orleans.

At all such elections and at all corporate meetings, every stockholder shall be entitled to one vote for each share of stock standing in his name on the books of the Company, to be cast in person or by his written proxy, and a majority of the votes cast shall elect.

Any vacancy occurring among the directors by death, resignation or otherwise, shall be filled by election for the remainder of the term by the remaining directors.

A failure to elect directors on the date above specified shall not dissolve the corporation, nor impair its corporate management, but the directors then in office shall remain in office until their successors are elected and qualified.

The Board of Directors shall elect from their own number a President and two or more Vice-Presidents. They shall also elect a Secretary and a Treasurer, or one person who shall be both, either of whom may or may not be members of the Board. They may from time to time name and appoint all such other officers and agents as they may deem necessary for the purpose and business of the corporation. They shall have power to fix and define the duties of every officer and employee, and all officers and employees shall hold office and employment at the pleasure
57 of the Board. The Board may make and establish, as well as alter and amend, any and all by-laws, rules and regulations necessary and proper in its judgment for the conduct, support and management of the business and affairs of said corporation.

The Board shall have full power and authority to borrow money, to execute mortgages and to create liens; to issue bonds, notes and other obligations, and generally to do all things reasonable, convenient and necessary for the proper carrying on of the business of the corporation.

The Board may issue full-paid shares of stock for cash, or in payment of labor done or property actually received by said corporation.

The Board shall have the power to name and appoint transfer agents in financial centers to make transfers of the stock of this corporation, and under such reasonable rules and regulations as the Board may establish. Stock transferred on the books of such transfer agents shall be deemed transferred on the books of the Company.

Article VI.

Whenever this corporation may be dissolved, either by limitation or from any other cause, its affairs shall be liquidated by three commissioners, to be appointed from amongst the stockholders at a general meeting of the stockholders convened for such purpose, of which meeting notice shall be given in the manner and time provided for stockholders' meetings by Article VII of this Charter, and a majority in amount of the capital stock of said Company represented at such meeting shall be requisite to elect. Said Commissioners shall remain in office until the

affairs of said corporation shall have been fully liquidated. In case of death of one or more of said commissioners the vacancy shall be filled by election by the surviving commissioners.

Article VII.

This act of incorporation may be modified, changed or altered, or said corporation may be dissolved with the assent of three-fourths of the capital stock represented at a general meeting of the stockholders convened for such purposes, and after notice shall have been given in one or more newspapers published in the City of New Orleans, once a week for four weeks preceding the meeting and by a written notice to each stockholder, mailed to him thirty days prior to the date of meeting, at the post office address designated by him in writing.

Any changes proposed or made in reference to the capital stock shall be made in accordance with the laws of the State of Louisiana on the subject of altering the capital stock of corporations.

Article VIII.

No stockholder shall ever be held liable for the contracts or faults of said corporation in any further sum than the unpaid balance due the corporation on the shares of stock owned by him, nor shall any mere informality in organization have the effect of rendering this charter null, or of exposing a stockholder to any liability beyond the unpaid amount remaining due on his stock.

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Article IX.

Louis S. Berg, Benjamin L. Winchel, Ivy T. Preston, Edgar H. Farrar and Ernest B. Kruttschnitt have been chosen and selected as the first Board of Directors of this corporation, to serve as such until the second Monday in February, 1904, or until their successors shall have been elected and qualified.

The subscribers hereto have respectively written opposite their names the amount of stock in this corporation subscribed

for by each of them, so that this act of incorporation may also serve as the original subscription list of said corporation.

Thus done and passed at my office, in the City of New Orleans, in the presence of Messrs. H. H. Waters and Wm. R. Mason, competent witnesses, of lawful age, both of this city, who hereunto sign their names with the said appearers and me, notary, on the day and date aforesaid, after due reading of the whole.

(Original signed) BENJAMIN L. WINCHELL,
10 shares, $1,000.00.

EDGAR H. FARRAR,
10 shares, $1,000.00.

E. B. KRUTTSCHNITT,
10 shares, $1,000.00.

LOUIS S. BERG,
10 shares, $1,000.00.

IVY T. PRESTON,
10 shares, $1,000.00.

WILL H. LYFORD,
10 shares, $1,000.00.

Witnesses:

H. H. WATERS.

WM. R. MASON.

ABRAHAM GOLDBERG,
Notary Public.

I, the undersigned Recorder of Mortgages, in and for the Parish of Orleans, State of Louisiana, do hereby certify that the above and foregoing act of incorporation of the "New Orleans and San Francisco Railroad Company" was this day recorded in my office in Book 750, folio 24.

New Orleans, January 2, 1903.

EMILE LEONARD,
Deputy Recorder.

I, the undersigned Notary Public, do hereby certify that the above and foregoing is a true and correct copy of the original act of incorporation of the "New Orleans and San
59 Francisco Railroad Company," on file and on record in my office, together with the certificate from the Deputy Recorder of Mortgages thereto attached.

Witness my hand and seal this — day of —, A. D. 1903.

_____,

Not. Pub.

Amendments to Articles I, IV, V and IX of the Charter of the New Orleans and San Francisco Railroad Co.

United States of America,

State of Louisiana,

Parish of Orleans, City of New Orleans.

Be It Known, That on this thirtieth day of the month of June, in the year of our Lord one thousand nine hundred and three, and of the Independence of the United States of America the one hundred and twenty-seventh—

Before me, Abraham Goldberg, a notary public, duly commissioned, sworn and qualified in and for the Parish of Orleans, State of Louisiana, and in the presence of the witnesses hereinafter named and undersigned—

Personally came and appeared Benjamin F. Winchell, Louis S. Berg, Will H. Lyford, Edgar H. Farrar, Ernest B. Kruttschnitt and Ivy T. Preston, who declared that a general meeting of the stockholders of the New Orleans and San Francisco Railroad Company, a corporation created under the laws of the State of Louisiana, as per acts of incorporation executed before the undersigned notary, on the 31st day of December, 1902, and recorded in the Mortgage Office of this Parish, in Book 750, folio 24, was held this day, June 30, 1903, at 12 o'clock, at the office of said Company, in the City of New Orleans, after due notice

had been duly given in The Times-Democrat by continuous publication in said newspaper from the 17th day of May, 1903, to the 30th day of June, 1903, inclusive, and by a written notice mailed to each stockholder, at his post office address, designated by him in writing, more than forty days before the date of said meeting, said stockholders' meeting having been called to amend Articles I, IV, V and IX, of the charter of said Company, and for other purposes.

That at said meeting of stockholders, so held on this 30th day of June, 1903, at 12 o'clock, it was resolved, by the unanimous vote of all the stockholders of said Company, that Articles I, IV, V and IX of the charter of the said New Orleans and San Francisco Railroad Company should be amended so as to read as follows:

"Article I.

"The name of this corporation shall be 'New Orleans Terminal Company,' and under its corporate name it shall have power and authority to have and enjoy corporate existence and succession for the full term and period of ninety-nine years from and after the date hereof, to contract, sue and be sued, to make and use a corporate seal, and the same to alter and break at pleasure; to hold, receive, lease, purchase and convey, as well
60 as mortgage and hypothecate, property, real, personal and mixed, corporeal and incorporeal; to name and appoint such managers, agents, directors and officers as its business, interest and convenience may require, and to make and establish as well as alter and amend, from time to time, such by-laws, rules and regulations for the proper government of the affairs of said corporation as may be necessary and proper."

"Article IV.

"The capital stock of said corporation is hereby fixed at the sum of two million dollars ($2,000,000.00), divided into and represented by twenty thousand (20,000) shares of stock of the sum of one hundred dollars ($100.00) each. Said stock shall be paid for in cash, at such time, in such amounts, and after such notice

to the subscribers as may be fixed by the Board of Directors, or the same may be issued at not less than par for labor done, or property actually received by the corporation.

"The corporation shall become a going concern and be authorized to do business as soon as six thousand dollars ($6,000.00) of its capital stock shall have been subscribed for."

"Article V.

"All the corporate powers of said corporation shall be vested in and exercised by a Board of Directors, to be composed of six stockholders, to be elected annually on the second Monday in February in each year, except the first Board appointed in this charter, who shall hold their offices until the second Monday in February, 1904.

"All such elections shall be held by ballot and conducted at the office of said corporation, under the supervision of three commissioners to be appointed by the Board of Directors.

"Notice of such election shall be given by the Secretary of the Company by publication for not less than ten days prior thereto in a newspaper published in the City of New Orleans.

"At all such elections and at all corporate meetings every stockholder shall be entitled to one vote for each share of stock standing in his name on the books of the Company, to be cast in person or by his written proxy, and a majority of the votes cast shall elect.

"Any vacancy occurring among the directors by death, resignation or otherwise, shall be filled by election for the remainder of the term by the remaining directors.

"A failure to elect directors on the date above specified shall not dissolve the corporation nor impair its corporate management, but the directors then in office shall remain in office until their successors are elected and qualified.

"The Board of Directors shall elect from their own number a President and two or more Vice-Presidents. They shall also elect a Secretary and Treasurer, or one person who shall be both, either of whom may or may not be members of the Board. They may from time to time name and appoint all such other officers and agents as it may deem necessary for the purpose and busi-

ness of the corporation. They shall have power to fix and define the duties of every officer and employee, and all officers and employees shall hold office and employment at the pleasure
61 of the Board. The Board may make and establish, as well as alter and amend, any and all by-laws, rules and regulations necessary and proper in its judgment for the conduct, support and management of the business and affairs of said corporation.

"The Board shall have full power and authority to borrow money, to execute mortgages and to create liens; to issue bonds, notes and other obligations, and generally to do all things reasonable, convenient and necessary for the proper carrying on the business of the corporation.

"The Board may issue full-paid shares of stock for cash, or in payment of labor done or property actually received by said corporation.

"The Board shall have the power to name and appoint transfer agents in financial centres to make transfers of the stock of this corporation, and under such reasonable rules and regulations as the Board may establish. Stock transferred on the books of such transfer agents shall be deemed transferred on the books of the Company."

"Article IX.

"Louis S. Berg, Benjamin L. Winchell, Ivy T. Preston, Edgar H. Farrar, Ernest B. Kruttschnitt and W. H. Lyford have been chosen and selected as the first Board of Directors of this corporation, to serve as such until the second Monday in February, 1904, or until their successors shall have been elected and qualified.

"The subscribers hereto have respectfully written opposite their names the amount of stock in this corporation subscribed for by each of them, so that this act of incorporation may also serve as the original subscription list of said corporation."

That at said meeting of stockholders it was further resolved that all of the stockholders of the New Orleans and San Francisco Railroad Company should appear before the undersigned notary and put all the said amendments into the form of a

notarial act, and that the parties make this appearance and execute this act for the purpose of carrying out the resolution adopted at the said meeting of stockholders, and annex to this act certified copies of the resolution adopted at said stockholders' meeting, for all the purposes above set forth.

Thus done and passed at my office, in the City of New Orleans, on the day, month and year first above written, in the presence of Messrs. H. H. Waters and A. R. Beary, competent witnesses, who have hereunto signed their names, together with the said appearers and me, notary, after due reading of the whole.

(Original Signed) BENJAMIN L. WINCHELL.
LOUIS S. BERG.
WILL H. LYFORD.
EDGAR H. FARRAR.
ERNEST B. KRUTTSCHNITT.
IVY T. PRESTON.

Witnesses:

H. H. WATERS.
A. R. BEARY.

ABRAHAM GOLDBERG,
Notary Public.

[Seal.]

62 I, the undersigned Recorder of Mortgages, in and for the Parish of Orleans, State of Louisiana, do hereby certify that the above and foregoing amendment of Articles I, IV, V and IX of the Charter of the New Orleans and San Francisco Railroad Company was this day duly recorded in my office, in Book 750, folio 465.

EMILE LEONARD,
Deputy Recorder.

New Orleans, June 30, 1903.

I, the undersigned Notary Public, do hereby certify that the above and foregoing is a true and correct copy of the original act of amendment to Articles I, IV, V and IX of the Charter of

the New Orleans and San Francisco Railroad Company, on file and on record in my office, together with the certificates of the Deputy Recorder of Mortgages thereto attached.

Witness my hand and seal, this — day of —, 1903.

_____,

Not. Pub.

Affidavit for Defendant.

Affidavit of Ephraim Simon. Filed May 6, 1905.

United States Circuit Court, Eastern District of Louisiana.

No. 13300. In Equity.

Southern Railway Company

versus

Ephraim Simon.

EPHRAIM SIMON, being duly sworn, deposes and says:

That he now supplements his former affidavit filed in this cause;

That he is a manufacturer and merchant in the City of New Orleans; that he has been repeatedly applied to by the agents of the Southern Railway Company, or those representing themselves to be its agents, soliciting on behalf of said railway company, shipments of merchandise over its line of railway and its connecting carriers, with whom your deponent believes it has traffic arrangements;

That your deponent has, as a matter of fact, shipped out of the City of New Orleans merchandise, and has received from those holding themselves out to be the representatives of said railway company, bills of lading for said shipments; and that he has purchased in the City of New Orleans railway transportation over the southern railway from those holding themselves out as representatives of said Southern Railway.

And deponent further says that he is advised, informed and believes, and so avers the fact to be, from representations made by J. C. Andrews, of this City, that he is the local representative and agent of said Southern Railway System in the City
63 of New Orleans employed by it and compensated by said Southern Railway Company for the services performed; and deponent further says that he is advised, informed and believes, and therefore avers the fact to be, that ——— Graham, is the freight soliciting agent of the Southern Railway Company in the City of New Orleans, representing said company, soliciting business in its behalf and at times entering into contracts in the City of New Orleans on behalf and for account of said Southern Railway Company;

That he is advised, informed and believes, and therefore avers the fact to be that said Southern Railway Company does business in the City of New Orleans and has done business for some time past, and has its agents and representatives in this city transacting business for and in its behalf.

Further, deponent sayeth not.

(Signed) E. SIMON.

Sworn to and subscribed before me this 25th day of March 1905.

(Signed) H. MICHEL,
Not. Pub.

Submission of Rule for Injunction.

Extract from the Minutes.

April Term, 1905.

New Orleans, Saturday, May 6, 1905.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange District Judge.

No. 13300.

Southern Railway Company

versus

Ephraim Simon.

This cause came on to be further heard upon the motion of complainant for an injunction herein.

H. H. Hall appearing for the Complainant.

H. L. Lazarus for the defendant.

Whereupon counsel for the respective parties offered affidavits and evidence, and same was filed.

The cause was then argued by the Solicitors and submitted when the Court took time to consider.

64 Note of Evidence. Filed June 7, 1905.

Southern Railway Company

versus

Ephraim Simon.

Note of Evidence.

By Mr. Hall: On behalf of the complainant, I offer in evidence the affidavit annexed to the bill of complaint, marked Exhibit "A."

Objection by Judge Lazarus: Counsel for the defendant objects to the consideration by the court of the affidavit annexed to the bill, on the ground that the affidavit attached to the Bill was made prior to the filing of the Bill, and, therefore, is not an affidavit in this cause; that the affidavit bears date the 31st of January 1905, and the clerk's endorsements [endorsement] shows the filing of the Bill is on February —th, 1905.

By the Court: I will consider the matter; let the affidavit go in over the objection.

Offer by Mr. Hall: I further offer in evidence Exhibit marked "A," being a certified copy of the transcript of the proceedings had in the case in the Civil District Court for the Parish of Orleans.

I also offer in evidence: Affidavit of Dr. E. D. Martin, being "Exhibit B."

Objection by Judge Lazarus: Counsel for the defendant now makes formal objection to the affidavit of the said Dr. E. D. Martin in so far as it involves the merits of the case in the Civil District Court,—that issue not being before the court,—and that this court is not competent to review the evidence, in the lower court.

By the Court: Let the evidence go in over objection.

Offer by Mr. Hall: Counsel for complainant also offers in evidence affidavit of F. C. Shumate, marked Exhibit "C."

Objection by Judge Lazarus: Counsel for the defendant objects to any affidavit being offered in evidence touching what negotiations took place prior to the entry of the judgment in this case.

By the Court: Let it go in over objection.

Offer by Mr. Hall: Counsel for complainant further offers in evidence, affidavit of Walter Kennedy, marked Exhibit "E."

Also affidavit of the same person marked exhibit "D."

Also Affidavit of Dr. E. D. Martin, Marked Exhibit "F."

Also affidavit from the same person marked Exhibit "G."

Also affidavit of John C. Andrews, "Exhibit H."

Also affidavit of H. H. Hall, marked "Exhibit I."

Also affidavit of W. W. Finley, marked "Exhibit J."

Also the charter of the New Orleans Terminal Company, referred to in the affidavit and marked "Exhibit X."

Also offer in evidence letter of the Secretary of State addressed to H. H. Hall, and particularly that portion to the effect that the Secretary of State received the summons and did not send it to the Southern Railway Co., but put it on the files of his office.

Closed.

65 Note of Evidence. Filed June 7, 1905.

Circuit Court of the United States for the Fifth Circuit, Eastern District of Louisiana.

No. 13300.

Southern Railway Company

vs.

Ephraim Simon.

Note of Evidence on Behalf of the Defendant in the Above Numbered and Entitled Cause, Hon. Charles Parlange, Judge Presiding.

Appearances.

Harry H. Hall, Esq., Solicitor for Complainant.

Henry L. Lazarus, Esq., Solicitor for Defendant.

Offer by Judge Lazarus: Counsel for the defendant offers in evidence on the rule to show cause why a temporary injunc-

tion should not issue herein, deposition of Honorable Walter B. Sommerville, Judge of the Civil District Court before whom the case was tried.

Also:

Deposition of Henry L. Lazarus,
Deposition of Ephraim Simon,
Deposition of Dr. C. A. Gaudet,
Deposition of Eva E. Simon,
Deposition of Herman Michel,
Deposition of Gustave Lehman, Jr.,
Deposition of Gustave Lehman, Sr.,
Deposition of Eugene Ellis,
Deposition of Charles Morgan,
Deposition of William Adler,
Deposition of Adolph Katz,
Deposition of Herman Weil,
Deposition of Leon Schwartz,
Deposition of Felix Levy,
Deposition of S. E. Worms,
Deposition of J. H. Curtin,
Deposition of Charles H. Culbertson,
Deposition of G. Wagatha, and
Supplemental affidavit of Ephraim Simon.

Objection by Mr. Hall: Counsel for the respondent having requested counsel for complainant to permit the offer of all of his exhibits, and then object to them collectively, and not singly, counsel for Complainant now objects to the offer of any of the Depositions because a general demurrer has been filed
66 to this bill, and, under that general demurrer, the allegations and averments of the Bill cannot be contradicted until the demurrer is disposed of; and, while it is pending and undetermined, no evidence can be offered on this application.

Whereupon, Mr. Lazarus, Counsel for respondent temporarily withdraws the demurrer.

Memorandum of Reasons. Filed —— 9th, 1905.

United States Circuit Court, Eastern District of Louisiana.

No. 13300.

Southern Railway Company

vs.

Ephraim Simon.

Memorandum of Reasons.

June 9, 1905.

(Dictated.)

A restraining order having heretofore issued herein, the matter now before the Court is whether or not a preliminary injunction shall issue.

The main contention on behalf of the defendant, is that this court is precluded from issuing an injunction in this cause because of the prohibition of Sec. 720 Rev. Stats.

It is thoroughly settled that the statute just mentioned has no application to such a cause as the instant one. See Massie et al. vs. Buck 128 Fed. Rep. 27, settling the question in this Circuit. See authorities cited in that case. See National Surety Company, etc., vs. State Bank, etc. (C. C. A. 8th Circuit), 120 Fed. Rep. 593; Terre Haute, &c., Co. vs. Peoria &c Company, 82 Fed. Rep. 943; Garner vs. Second Nat. Bank, &c. (C. C. A. 1st Circuit), 67 Fed. Rep. 833. Circuit Judge McCormick, in Central Trust Company vs. St. Louis &c. Company, 59 Fed. Rep. 386; Julian vs. Central Trust Co. 193 U. S. 112, and other cases.

Section 720 Rev. Stats. applies only to cases where the jurisdiction of the state court has attached first. Justice Field, in Sharon vs. Terry, 36 Fed. Rep. 365; Justice McKenna in President &c. vs. Merritt et al, 59 Fed. Rep. 7; Lanning vs. Osborne, 79 Fed. Rep. 662, and other cases. Notice Whitney vs. Wilder (C. C. A. 5th Circuit), 54 Fed. Rep. 554.

In the Federal Courts, a trial judge, in such a cause as the instant one, has the right in the exercise of a sound discretion to issue a preliminary injunction in order to preserve the status quo until the final determination of the cause. Circuit Judge Shelby in Massie vs. Buck, supra; Railroad Commission &c. vs. Rosebaum &c. Company, 130 Fed. Rep. 110; Northern Securities Company vs. Harriman, 134 Fed. Rep. 331; Kerr vs. New Orleans, 126 Fed. Rep. 924.

67 The meaning of Section 720 Rev. Stats. is perfectly plain. That statute was intended only to prohibit the Federal Courts from attampting [attempting] to act as Courts of review over the State Courts. But Congress never intended that the Federal Courts in matters of which they have jurisdiction, should be deprived of any power of injunction necessary for the assertion and maintenance of that jurisdiction. The Federal Courts would be infirm and impotent indeed if, when causes are brought to them which they are competent to decide they could not afford the ancillary protection without which the relief sought in the causes could not be given. In such cases, the Federal courts certainly have the same powers that the State Courts would have if the causes were brought to them.

It was conceded in the argument—and the matter is obvious without the concession—that the complainant in this cause could have brought this action in the State Courts, coupling therewith a prayer for an injunction. This being unquestionably true, why cannot the complainant, being a citizen of another state, apply to this court and obtain from it the same remedies which the State Court would grant it?

The present action was brought first to this Court. That action is not now pending in the State Court and has never been in that Court.

The matter is so clear that further discussion of it would be futile.

Notice that the case of National Surety Company &c. vs. State Bank &c. (C. C. A. 8th Circuit), 120 Fed. Rep. 593—cited supra—is very similar to the instant cause.

Other secondary matters urged on behalf of the defendant are either without force or else are questions which do not properly arise at the present stage of the litigation.

A preliminary injunction will issue on complainant's giving bond with security in the sum of $2000,—the restraining order to remain in force until the issuance of the preliminary injunction.

Order Granting Preliminary Injunction. Filed June 9, 1905.

U. S. Circuit Court, Eastern District of Louisiana. In Equity.

No. 13300.

Southern Railway Company

vs.

Ephraim Simon.

This cause came on at this term to be heard upon the application of the Complainant for a preliminary Injunction, and after hearing the pleadings, affidavits, exhibits and evidence offered, and the arguements [arguments] of Counsel for the respective parties, was submitted to the Court and the Court took the same under advisement:

68 Whereupon, after duly considering the same, it is now ordered by the Court, for the reasons assigned in writing and filed this day, that the application of the Complainant for a Preliminary Injunction be granted, and that a preliminary Injunction do issue as prayed for in the Bill of Complaint upon the Complainant giving Bond with security in the sum of $2000.

It is further ordered that the restraining order heretofore issued remain in force until the issuance of the preliminary Injunction.

New Orleans, La., June 9th, 1905.

CHARLES PARLANGE,

U. S. Judge.

Order Appointing Special Master. Filed June 10, 1905.

United States Circuit Court, Eastern District of Louisiana.

No. 13300.

Southern Railway Company

vs.

Ephraim Simon.

The Court hereby appoints Hon. Charles F. Buck to be Special Master in Chancery in this cause with all the powers possessed by Masters in Chancery.

This cause is now referred to him and he is specially authorized and directed to hear and take all testimony and evidence in this cause and to report the same to this Court together with his findings of law and fact on any and all matters which may come before him in this cause.

New Orleans, La., June 10th, 1905.

(Signed) CHARLES PARLANGE,
U. S. Judge.

69 Acceptance of Appointment as Special Master. Filed June 14, 1905.

Buck, Walshe & Buck

Chas. F. Buck. Geo. C. Walshe. Chas. F. Buck, Jr.

Law Office, Masonic Temple, Rooms 16-17.

Telephone 1389.

New Orleans, La., 6/13/1905.

U. S. Circuit Court, Eastern Dist. of Louisiana.

No. 13300.

Southern Railway Co.

vs.

Ephraim Simon.

To H. J. Carter, Esq., Clerk of said Court.

Dear Sir: I beg to acknowledge receipt of copy of order certified by you entered by Honorable Chas. Parlange Judge in

the Circuit Court, in the above entitled cause and appointing me Special Master in Chancery.

Having no interest or connection with said cause which would prevent me acting in said capacity I accept the trust and notify you accordingly. Will you kindly transmit to me the record in the cause, and permit me to remain.

Yours very truly,

(Signed) CHARLES F. BUCK.

Bond of Injunction. Filed June 17, 1905.

United States Circuit Court, Eastern District of Louisiana.

No. 13300.

Southern Railway Co.

vs.

Ephraim Simon.

Bond of Injunction.

Know all men by these presents, That we The Southern Railway Company as principal and Fidelity and Deposit Company of Maryland as security, of the City of New Orleans, and State of Louisiana, are held and firmly bound unto Ephraim Simon in the sum of Two Thousand Dollars lawful money of the United State of America, to be paid to said Ephraim Simon heirs, executors, administrators and
70 assigns, for which payments well and truly to be made, we bind ourselves and each of us, by himself and each of our heirs, executors, administrators, firmly by these presents.

Sealed with our seals and dated the 16th day of June in the year of our Lord 1905.

Whereas, the said Southern Railway Company has obtained from the U. S. Circuit Court 5th Circuit E. Dist. of La. a decree for a writ of Injunction upon furnishing bond in the sum of $2000. in suit Southern Railway Co. vs. Ephraim Simon No. 13300 of the Docket.

Now, the condition of the above obligation is, That we, the above bound Southern Railway Company and Fidelity & Deposit Company of Md. will well and truly pay to the said Ephraim Simon the defendant in said suit all such damages as he may recover against us, in case it should be decided that the injunction was wrongfully obtained.

Signed, sealed and delivered in presence of

(Signed) SOUTHERN RAILWAY CO., [Seal.]

" By HARRY H. HALL, Att'y.

" FIDELITY & DEPOSIT CO. OF MD., [Seal.]

" By P. M. MILNER, Local Director.

Attest.

(Signed) WARNER & BLACK, [Seal.]
Gen'l Agents,

" By CHAS. H. BLACK.

Injunction Issued to Ephraim Simon, and Marshal's Return.

United States of America:

Circuit Court of the United States, Fifth Judicial Circuit and Eastern District of Louisiana.

No. 13300.

Southern Railway Co.

vs.

Ephraim Simon.

The President of the United States of America to Ephraim Simon, Greeting:

Whereas, it has been represented unto us in our said Circuit Court on the part of the Southern Railway Company in a Bill in Equity lately exhibited against you touching certain matters and things therein set forth.

Now, therefore, in consideration of the premises and of the allegations in said Bill contained, you, the said Ephraim Simon, your attorneys and each of you, are hereby commanded and strictly enjoined under the penalty of the law, that you
71 absolutely refrain and desist from further proceeding against Complainant, the Southern Railway Company under the suit and judgment in the suit entitled Ephraim Simon vs. the Southern Railway Company No. 74869 Civil District Court for the Parish of Orleans, or from issuing execution thereon or attempting thereunder to seize any property movable or immovable of said Complainant, or in any manner attempting to enforce the same and that you remain so inhibited and enjoined until the further order of our said Court in the premises.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the City of New Orleans, this 30th day of June in the year of our Lord, 1905.

(Signed) H. J. CARTER,

[Seal.] Clerk.

[Endorsed:] U. S. Circuit Court, Eastern District of Louisiana, New Orleans Division. No. 13300. Southern Railway Company vs. Ephraim Simon. Injunction to Ephraim Simon. Marshal's Return. Filed June 30, 1905.

Received by U. S. Marshal New Orleans La. June 30/05 and on same day month and year I served copy hereof on Ephraim Simon by handing the same to him personally in New Orleans La.

(Signed) VICTOR LOISEL,
U. S. Marshal.
By T. F. LAICHE, D'y.

Motion to Set Demurrer for Hearing. Filed July 26th, 1905.

U. S. Circuit Court.

No. 13300.

Southern Railway Company

vs.

Ephraim Simon.

On motion of Harry H. Hall of Counsel for Complainant it is ordered that Defendant's demurrer be set for hearing for —— day of —— 1905.

Motion to Set Demurrer for Hearing. Filed May 21, 1906.

U. S. Circuit Court.

No. 13300.

Southern Railway Company

vs.

Ephraim Simon.

On motion of Harry H. Hall, Solicitor for complainant, it is ordered that Defendant's demurrer in the above case be set for hearing for Saturday, June 2nd. at 11 A. M.

N. O. May 19th, 1906.

72 Stipulation as to Bond. Filed May 25, 1906.

United States Circuit Court.

No. 13300.

Southern Railway Co.

vs.

Ephraim Simon.

It is hereby stipulated by Counsel for Complainant and Defendant that the injunction bond herein given by Complainant, in support of the restraining order and injunction be cancelled and the surety on the said bond released; the Defendant regarding Complainant as amply solvent and sufficient to respond to any claim or damages that its acts may have inflicted in consequence of the writ of injunction herein applied for and issued. Defendant releases said complainant from furnishing bond as directed by the Court upon the issuance of the injunction in this cause.

(Signed) HENRY L. LAZARUS,
Solicitor for E. Simon, Def't.

HARRY H. HALL,
Sol. for Compl't.

Order Overruling Demurrer.

Extract from the Minutes.

November Term, 1906.

New Orleans, Saturday, December 15, 1906.

Court met pursuant to adjournment:
Present: Hon. Charles Parlange District Judge.

No. 13300.

Southern Railway Co.

vs.

Ephraim Simon.

This cause came on this day to be heard upon the Demurrer of Defendant.

Harry H. Hall appearing for Complainant.

Henry L. Lazarus for Demurrant.

Whereupon after hearing counsel for the parties.

It is ordered that said Demurrer be overruled and that the defendant be allowed until the First Monday in February 1907 time in which to plead or file his answer.

73 Order Correcting Order of December 15, 1906.

Extract from the Minutes.

November Term, 1906.

New Orleans, Wednesday, December 19, 1906.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, District Judge.

No. 13300.

Southern Railway Co.

vs.

Ephraim Simon.

On motion of H. L. Lazarus of Counsel for defendant and on suggesting that through error the Clerk in making the entry in this cause on Dec. 15, 1906, allowing time to the defendant,

entered the order as only allowing the defendant time to answer when the defendant should have been allowed time to plead or answer.

It is ordered that the Minutes of said date in said cause be amended to read as follows: "that the defendant be allowed until the First Monday in February, 1907, time in which to plead or file his answer.

Plea. Filed February 5, 1907.

In the Circuit Court of the United States for the Eastern District of Louisiana. In Equity.

No. 13300.

Southern Railway Co.

vs.

Ephraim Simon.

The Plea of the Above-named Defendant, Ephraim Simon, to the Bill of Complaint of the Above-named Complainant, The Southern Railway Company.

I, the defendant, Ephraim Simon, by protestation, not confessing or acknowledging all or any part of the matters or things in the said Bill of Complaint mentioned to be true in such manner and form as the same are therein set forth and alleged, do plead thereto, and for plea say:

1. That the Circuit Court of the United States is without jurisdiction to grant the relief herein sought, or an injunction directed against the defendant in this cause, or his
74 agents or attorneys, inasmuch as the judgment rendered in the cause of Ephraim Simon against the Southern Railway Company, No. — of the Civil District Court, was rendered by a Judge of a State Court seized with jurisdiction of said cause, and who, in the exercise of his judicial functions, was authorized and empowered to render judgment in the cause, and which judgment so rendered is reviewable alone by the Supreme Court of Louisiana, and, upon proper issued [issue] framed, could be the basis of a writ of error to the Supreme Court of the United States, and that any attempt upon the part

of the Circuit Court to set aside a judgment of the State Court is beyond its jurisdiction, and that any injunction issued, preliminary or finally against the issuance of process according to the laws of the State of Louisiana upon a judgment so rendered by a State Court is violative of the Constitution of the United States, and particularly of Section No. 720 of the Revised Statutes of the United States. The operative effect of said Section No. 720 of the Revised Statutes being a bar to plaintiff's present bill of complaint, and to the process of injunction sought therein.

2. That the Circuit Court of the United States is without power or jurisdiction to review, revise or set aside the judgment and decree rendered in the cause of Ephraim Simon vs. Southern Railway Company, set out in the Bill of Complaint herein and which judgment was rendered by the Honorable the Civil District Court for the Parish of Orleans a part of the judiciary of the State of Louisiana, with jurisdiction to hear and determine said cause, and that the said Court, whose judgment is herein assailed had full and complete jurisdiction of the parties and subject matter of the controversy herein.

3. That the Circuit Court of the United States is without power and jurisdiction to review constitutional questions raised in a proceeding attacking the validity of a judgment of a State when the State Court had jurisdiction of the cause, rationae materiae et personae, and that said constitutional question so agitated in the Bill of Complaint herein cannot be raised, heard or determined in this cause, which is an independent injunction bill to restrain the effective force and operation of a judgment of a State Court, the Complainant having full and ample remedy for relief, primarily in the Courts of Louisiana, and by a writ of error to the Supreme Court of the United States if the Courts of Louisiana deny to the Complainant a recognition of its alleged constitutional rights.

4. That the Circuit Court of the United States is without power or jurisdiction to review, revise or set aside the judgment of the Civil District Court for the Parish of Orleans, State of Louisiana, in the cause of Ephraim Simon vs. The Southern Railway Company, for error, mistake or irregularity in the trial of said cause or the rendition of judgment therein, whether such error, mistake or irregularity reults from the question of ad-

missibility of evidence, the service of process or an allowance of damages which Complainant may consider excessive.

5th. That the Circuit Court of the United States is without jurisdiction to grant the Complainant any relief in this
75 cause, for the reasons hereinbefore recited, and that as a court of equity it will not interfere with, or grant relief against judgments alleged to have been fraudulently obtained where said Bill of Complaint does not aver and set forth the fraudulent acts complained of, and does not aver and set out at large that Complainant has a meritorious and valid defense to the main cause of action on the merits of the claim, and of which he has been unjustly and inequitably deprived.

For further plea, defendant saith, that the averments in said Bill of Complaint, concluding with the charge of fraud are vague, uncertain and indefinite, in that, the facts and circumstances which constitute said alleged fraud, are not set forth with clearness, conciseness and with sufficient particularity to enable defendant to meet said charge.

6. That the Circuit Court of the United States, sitting in equity, is without jurisdiction to interfere with judgments rendered at law in the Civil District Court for the Parish of Orleans, State of Louisiana, unless the Complainant has a defense, of which it could not avail itself, or had a good and valid defense at law which it was prevented of availing itself by fraud or accident, unmixed with negligence on its part or that of its agents.

7. That the Circuit Court of the United States is without jurisdiction where the Complainant has a complete and adequate remedy in the Courts of the State of Louisiana, and where it has neglected to pursue the proper remedy laid down in the statute laws of the State either by moving timely for a new trial by appeal or by an action in nullity of judgment.

8. That the Circuit Court of the United States is without jurisdiction to entertain the said Bill of Complaint, for the reasons, that said Bill is not properly verified, in that, the affidavit in the Bill bears the date of January 31st, 1905, whereas the said Bill was not filed until February 6th, 1905, and, therefore there was no affidavit in said cause.

9. Against the further prosecution by Complainant of said cause, this defendant pleads that the depositions submitted

herein were made upon information and belief, and are insufficient for the issuance of said injunction, and that no affidavits were filed to sustain the alleged charges of fraud recited in the Bill of Complaint herein.

All of which matters and things, I aver to be true and plead the same to the said Bill, and humbly crave the judgment of this Honorable Court whether I ought to be compelled to make any further or other answer to the said Bill of Complaint.

(Signed) HENRY L. LAZARUS,
Solicitor for Def't.

(Sig.) LAZARUS, MICHEL & LAZARUS,
Of Counsel.

DAVID SESSLER,
Of Counsel.

76 I hereby certify that the foregoing plea is in my opinion, well founded in point of law.

New Orleans, February 4th, 1907.

(Sig.) E. SIMON.

Sworn to & subscribed before me on this 4th day of February, 1907.

(Sig.) H. MICHEL,
[Seal.] Not. Pub.

Replication to Plea. Filed April 19, 1907.

U. S. Circuit Court.

No. 13300.

Southern Railway

vs.

Ephraim Simon.

This repliant, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors uncertainties and insufficiencies of the plea of said defendant, for replication thereunto saith that it doth and will aver, maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by the said de-

fendant, and that the plea of the said defendant is uncertain, evasive and insufficient in law to be replied unto by this repliant; without that, that any other matter or thing in the said plea contained, material or effectual in law to be replied unto and not herein and hereby well and sufficiently replied unto confessed or avoided, traversed and denied, is true; all matters and things this repliant is ready to aver, maintain and prove as this Honorable Court shall direct and humbly pray as in its bill it hath already prayed.

(Signed) HALL & MONROE,
Solicitors for Repliant.

77 Motion to Set Plea for Hearing. Filed May 21, 1907.

U. S. Circuit Court.

No. 13300.

Southern Railway Company.

vs.

Ephraim Simon.

On motion of Hall & Monroe Solicitors for complainant it is ordered that Defendant's plea herein be set for hearing on the 27th day of May 1907 at 11 A. M.

Hearing and Order Overruling Plea & Allowing Defendant Until

First Monday in August to Further Plead or Answer.

Extract from the Minutes.

April Term, 1907.

New Orleans, Monday, May 27th, 1907.

Court met pursuant to adjournment.
Present: Hon. Eugene D. Saunders, District Judge.

No. 13300.

Southern Railway Company.

vs.

Ephraim Simon.

This cause came on this day to be heard upon the Plea of the defendant filed herein on February 5, 1907.

After hearing argument of counsel it was ordered by the Court that said plea be overruled, and that the defendant be allowed until the first Monday in August, 1907, to further plead or answer.

Answer. Filed August 5, 1907.

United States Circuit Court, Eastern District of Louisiana.

No. 13300.

Southern Railway Company.

vs.

Ephraim Simon.

The Answer of Ephraim Simon to the Bill of Complaint of the Southern Railway Company, Plaintiff.

Now and at all times hereafter saving to himself all and all manner of benefit or advantage of exception or otherwise
78 that can be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised is material and necessary for him to answer to, answering sayeth:

That he herein renews and specially pleads the general demurrer heretofore filed to the plaintiff's bill of complaint and his plea to the jurisdiction of the Court, the said demurrer and plea to be treated in this answer as though set forth in extenso, respectfully protesting against the action of the Court heretofore had upon the aforesaid demurrer and plea to the jurisdiction.

And for further plea in bar of the prosecution for the causes assigned in the bill of complaint herein, this respondent sayeth; that the issues sought to be raised by the bill of complaint herein were and are foreclosed and barred from further inquiry or prosecution under and by virtue of the judgment rendered in the cause entitled Ephraim Simon vs. Southern Railway Company, No. 74864 of the docket of the Civil District Court, in which all the issues now sought to be reviewed by plaintiff's bill of complaint, were determined and adjudged, and which judgment is conclusive and final of any inquiry herein,

and which judgment of record in said cause is annexed to and forms part of plaintiff's bill of complaint as an exhibit, and which judgment this respondent pleads as res adjudicata of the issues sought to be reviewed in this cause, and respondent pleads the said judgment in bar of the further prosecution of this case and demands as of right that the bill of complaint herein be dismissed.

And now, without prejudice to the pleas heretofore interposed to the further prosecution of this cause, this respondent answering the bill of complaint says:

First. That admitting that the complainant, the Southern Railway Company, is a corporation organized and existing under the laws of the State of Virginia, he is neither advised nor informed whether it is empowered to operate a line of railway in the State of Louisiana.

Second. That Ephraim Simon, the respondent in this cause, was at the time of the filing of the bill, and presently is, a citizen of the State of Louisiana.

Third. That it is true, as averred, that the respondent, Ephraim Simon was a passenger upon one of complainant's trains and was injured in consequence of a collision; the injuries, however, described in said bill, are not correctly stated, and the charge that respondent made a false claim for damages resulting from said collision, and fixed the amount thereof at the sum of Five Thousand Dollars, is in all respects false and untrue.

That at no time did this respondent make a statement or claim of the Southern Railway for any specific amount other than that embodied in his proceedings in the Civil District Court for the Parish of Orleans against the Southern Railway Company and which resulted in a judgment which is plead in bar of further inquiry in these proceedings and which is for the sum as shown by said judgment a copy of which is annexed to and made part of plaintiff's bill of complaint.

79 It is not true, as averred in said bill, that there was any understanding that negotiations which were opened by the Southern Railway Company looking to an adjustment without litigation of the damages sustained by respondent were held in suspense. The fact and truth is that preliminary nego-

tiations with respondent's counsel were terminated and the said railway company advised and informed that proceedings would be at once taken to recover full indemnity for the injuries sustained.

Fourth. That it is not true, as averred in said bill, that this respondent or his counsel at any time left the complainant in the belief that respondent was considering the proposition to adjust a settlement for the injuries sustained, or that the respondent would submit any further or other offer of settlement; but that the fact and the truth is that the negotiations between respondent's counsel and the company, so respondent is informed and believes, terminated abruptly with the distinct statement by respondent's counsel that proceedings would be immediately instituted for the recovery of the damages sustained in consequence of the injuries suffered by respondent, and that in pursuance of said information so communicated, proceedings were instituted by this respondent against the complainant herein in the Civil District Court for the Parish of Orleans; that the said cause was openly docketed reported in the daily court report published of court proceedings in the Parish of Orleans and published in the daily press and that the charge in said bill that said suit was surreptitiously entered is malicious, false and untrue; and the further charge contained in the paragraph referred to that your respondent made false and fraudulent claims is malicious and unwarranted, and the award by a jury duly empaneled in the Civil District Court to try the issues in the cause of this respondent against the Southern Railway Company, and the judgment of the Civil District Court finding independently of the verdict of the jury that the damages sustained had been proved and for which judgment was accordingly rendered, is conclusive of all injury [inquiry] in this Court, and could only be attacked in the Civil District Court within the time prescribed by law for actions of nullity on the ground that said judgment was procured and rendered by the administration of false evidence.

Fifth. The recitals contained in this paragraph of complainant's bill are substantially true, the citation to the Southern Railway Company having been served upon the Secretary of the State of Louisiana, in the absence of an agent designated by the

Southern Railway Company upon whom process could be served, and the said Southern Railway Company doing business in this State subject to the jurisdiction of the State Courts through process served upon the Secretary of State under the provisions of Act No. 54 of 1904.

Sixth. Your respondent is not advised whether the Southern Railway Company has any of its "lines of railway enter or traverse any part of the said State." Respondent admits that it is a foreign corporation, and the verdict of the jury and the judgment of the Court rendered in the case of Ephraim Simon vs. Southern Railway Company No. 74864 of the docket of
80 the Civil District Court for the Parish of Orleans, forecloses and concludes the inquiry as to whether it was transacting business in the State of Louisiana at the time of the service of process made in the cause above referred to upon the Secretary of State who by law was designated in the absence of a specially appointed agent upon whom process should be served for and on behalf of said Southern Railway Company; and that said legislation is valid and process served in accordance with the directions thereof is binding and effective and is not an attempted regulation of commerce, nor is the said statute in violation of the constitution of the United States.

Seventh. The failure of the Southern Railway Company, within the legal delays to appear and defend the cause of action of Simon vs. Southern Railway Company in the Civil District Court for the Parish of Orleans, entitled this respondent to his default and to the confirmation thereof, and all the delays allowed by law were accorded to the Southern Railway Company before either default or confirmation thereof was had, and the damages sued for in consequence of the injuries sustained were assessed in favor of this respondent and against the Southern Railway Company for the amount sued for, by a jury duly empaneled and sworn, and the verdict of which jury having received the sanction of the judge presiding who had jurisdiction ratione materiæ et ratione personæ, concludes all injury [inquiry] as to the allowance by said judgment and the correctness thereof, this Court being without the power to review the record of proceedings had in the Civil District Court for the Parish of Orleans.

The charge in the paragraph referred to that the respondent "fraudulently caused to be entered by said jury a verdict" is malicious and false and is a conclusion without recitals of facts sufficient to inform this respondent in what respect said verdict was fraudulently entered; and that the charge contained in the second paragraph of said article that this respondent "in confirming the said default was guilty of subterfuge and fraud in claiming and adducing testimony to the effect that he had sustained damages in the sum of $13,348.00 as above detailed" is a malicious and false charge, unsupported by any recitals of fact. The truth and the fact is, as the record shows that the verdict of the witnesses called and examined on behalf of respondent in reference to the injuries sustained and whose testimony was in all respects truthful, and that the jury found said verdict and the judge found that the damages sustained had been proved. That the charge is general in not detailing and specifying in what respect there was subterfuge, or in what respect there was fraud in the administration of proof, and that all injury as to the evidence administered with reference to and in the consideration of which the jury and the trial judge rendered their judgment, is conclusive in this proceeding and in this Court, and the execution of respondent's judgment against the Southern Railway Company, said judgment being final, cannot be controlled by a writ of injunction issuing from this Court, the law of the land affording and providing a full, adequate
81 and complete remedy if injury has been inflicted by said judgment, but that the remedy provided by law is not by an appeal or review of the verdict and judgment of the Civil District Court of the Parish of Orleans, State of Louisiana, to the Circuit Court of the United States for the Fifth Circuit, said court being a court of concurrent and co-ordinate jurisdiction.

Ninth. Respondent is not advised or informed whether the Secretary of State upon whom process was served in the case of Simon vs. Southern Railway Company, notified the said Southern Railway Company, or whether they had knowledge of the pendency of said cause, or whether it was the duty of the Secretary of State, in the absence of directions from the Southern Railway Company to notify the said Southern Railway Company, but the fact and the truth is that before the judgment in the cause was signed and while there was time for the Southern Railway Com-

pany to make a motion for a new trial in said Court, the said Southern Railway Company was advised of the finding of the verdict and the rendition of the judgment and had ample time before the signing of said judgment, which is necessary under the laws of Louisiana to the rendition of a judgment, to apply for the reopening of the cause or for a new trial therein on any of the grounds provided by law for the granting of new trials, and that even after said judgment was signed, said Southern Railway Company had the right under the laws of Louisiana to prosecute its appeal from said judgment to the Supreme Court of Louisiana, and if error appeared upon the record, to prosecute its writ of error to the Supreme Court of the United States for its review of said judgment; or, under the laws of Louisiana, it had the right to institute proceedings in the Court which rendered the judgment to annul the same and there assign the right here asserted under the Constitution of the United States, which could, in the event of an adverse decision by the highest Court of the State, be removed on writ of error to the Supreme Court of the United States and have there determined the force and validity of the judgment complained of.

Tenth. Respondent says that the general charge contained in the bill that the verdict of the jury and the judgment of the Court "are unconscionable as having been rendered fraudulently and upon false testimony—and that it would be against good conscience to allow said judgment to be used to extort money that is not owing from" complainant, is a false and malicious charge, the verdict and judgment of the Civil District Court establishing the justice of plaintiff's demand and which is in recognition of the damages sustained and justly due by the complainant to respondent, the inquiry as to the quantum of damage being foreclosed and concluded by the judgment aforesaid, and it nowhere appears in said general and malicious charge in what respect the said judgment is unconscionable, or that it was rendered fraudulently and upon false testimony. That it is not true as charged in said bill that plaintiff had "a complete and meritorious defense to the claim upon which said demand is based." It is nowhere indicated what defense the said Southern Railway Company had and the said charge is inconsistent with other parts of complainant's bill admitting that this respondent did suffer an injury in consequence of the collision which occurred upon its road while respondent

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was a passenger thereon, the measure of damages sustained being the only question, according to the recitals of complainant's bill; and that the question of quantum of damages having been determined by the judgment of the Civil District Court is conclusive.

Eleventh. That it is not true as charges [charged], that complainant "was prevented from availing itself of the defense to the cause of action embodied in said proceeding and that it has been without negligence either of itself or its agent in the premises." As herein recited, the said Southern Railway Company was timely advised of the rendition of the verdict and of the judgment thereon before the signature of the judge to said judgment, and did not avail itself of the remedies pointed out by law either to reopen the cause to secure time for further consideration or by a motion for a new trial or by appeal, or by action for nullity; and that it has allowed said judgment to be signed and has allowed by the lapse of time said judgment to become final; and if the judgment herein sought to be controlled by the writ of injunction is open to collateral attack, the laches and negligence of the complainant precludes it from any relief in equity.

Twelfth. It is true that the respondent was in the act of issuing his writ of fieri facias upon the judgment which he had obtained against the Southern Railway Company and was about to seize the property of said Southern Railway Company within the jurisdiction of the Civil District Court, the said property of said company being within the jurisdiction of said Civil District Court and used by the Southern Railway Company in furtherance of the business of said Southern Railway Company operated and conducted in the State of Louisiana, when, by this Court's process the injunction, herein sought to be maintained was issued, and which has effectively up to the present time, restrained the respondent in the assertion of his rights and the use to which he is entitled of the process of the Courts of the State of Louisiana in the execution of a judgment duly and regularly rendered by a Court seized of jurisdiction ratione materiæ et ratione personæ, and which judgment, until reversed or annulled by a Court of competent jurisdiction, is conclusive in all other courts of concurrent and co-ordinate jurisdiction.

And this defendant denies all and all manner of unlawful, combination and confederacy wherewith he is by the said bill charges [charged], without this that there is any other matter, cause or thing in the said plaintiff's bill of complaint contained material and necessary for this defendant to make answer thereto and not therein and hereby well and sufficiently answered, confessed, traversed or avoided, is true to the knowledge or belief of this defendant, all which matters and things this defendant is ready and willing to aver, maintain and prove as this Honorable Court shall direct.

Respondent reserving his rights to claim such damage as he may have sustained in consequence of the writ in this
83 cause, and of the malicious and false charges preferred against him, prays, (1) a reconsideration upon the final hearing of his plea to the jurisdiction; (2) consideration and allowance of his plea in bar interposed and incorporated in this answer; and upon recognition of either plea and its maintenance, that the bill of complaint herein be dismissed; and that if the Court should maintain its primary judgment on the plea to the jurisdiction and overrule the plea in bar herein which respondent says adjudges and concludes all inquiry into the judgment rendered in the cause of Simon versus the Southern Railway Company, then respondent prays that complainant's bill be dismissed with costs, reserving to respondent his right to such further action as he may be advised for the issuance of the writ in this cause, and such damages as he has sustained in consequence of the recitals contained in the complainant's bill. And respondent prays for all further and necessary orders in the premises, and for general and equitable relief.

(Signed) EPHRAIM SIMON.

(Sig.) LAZARUS, MICHEL & LAZARUS,

Solicitors for Ephraim Simon, Respondent.

August 5th, 1907.

State of Louisiana, Parish of Orleans:

Ephraim Simon, being duly sworn, deposes and says; That the plea in bar incorporated in his answer is not interposed for

delay but he is advised is well founded in point of law. That his answer to the bill of complaint in so far as matters therein recited as of his own knowledge are true and those recited upon information and belief, he believes to be true.

(Signed) EPHRAIM SIMON.

Sworn to and subscribed before me this fifth day of August 1907.

(Sig.) H. MICHEL,
Not. Pub.

[Seal.]

I certify that in my opinion the plea in bar incorporated in the answer herein is well founded in point of law.

(Signed) HENRY L. LAZARUS.

New Orleans, 5/07.

Replication. Filed August 19, 1907.

U. S. Circuit Court.

No. 13300.

Southern Railway

vs.

Ephraim Simon.

This repliant saving and reserving to itself all and all manner of advantage of exception which may be had and
84 taken to the manifold errors uncertainties and insufficiencies of the plea of said defendant, for replication thereunto saith that it doth and will aver, maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by the said defendant, and that the plea of the said defendant is uncertain, evasive, and insufficient in law to be replied unto by this repliant; without that, that any other matter

or thing in the said plea contained, material or effectual in law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided traversed or denied, is true: all matters and things this repliant is ready to aver, maintain and prove as this honorable Court shall direct and humbly pray as in its bill it hath already prayed.

(Signed) HALL & MONROE,
Solicitors for Repliant.

Motion to Punish for Contempt. Filed November 11, 1907.

Nov. 9th, 1907.

No. 13300.

Southern R'y Company

vs.

Ephraim Simon.

Messrs. Lazarus, Michel & Lazarus, Solicitors, City.

Gentlemen: You are hereby notified that in the above entitled proceeding No. 13,300 of the Docket of the United States Court, Eastern District of Louisiana, we will, in the Court Room of said Court in this city, on the 15th day of November 1907, at 11 A. M. move that the said Ephraim Simon defendant, stand committed for breach of the injunction herein rendered and we hand you herewith copy of the said motion together with affidavit thereto, annexed, showing service of said injunction.

Yours respectfully,

(Signed) HALL & MONROE,
Solicitors for Southern Railway Co.

United States Circuit Court, Eastern District of La.

No. 13300.

Southern Railway Company

vs.

Ephraim Simon.

On motion of Hall & Monroe, of Counsel for Plaintiff, and on suggesting that, on the bill of complaint herein, there was rendered on the 30th of June 1905, a decree of this Court enjoining Respondent Ephraim Simon, his attorneys and each of them, that they absolutely refrain and desist from further
85 proceeding against complainant, the Southern Railway Company, under a certain judgment, entitled "Ephraim Simon vs. Southern Railway Company, No. 74869 of the Docket of the Civil District Court for the Parish of Orleans, or from issuing execution thereon or attempting thereunder to seize the property movable or immovable of the said Complainant the Southern Railway Co., or in any manner attempting to enforce the said Judgment:

That the said judgment was personally served on the said Ephraim Simon on the 30th of June, 1903, by the Marshal of this Court:

On further suggesting, that repeatedly since the service of this injunction, the said Ephraim Simon, by his attorneys, has threatened to disobey and disregard the same and to issue execution; and that he has now deliberately and intentionally violated the said writ of injunction by causing to issue from the Civil District Court in the said proceeding, No. 74869 of its docket, a writ of fieri facias and has instructed the Civil Sheriff for the Parish of Orleans thereunder, to seize the property, movable and immovable of the said Southern Railway Company and has caused notices of this seizure with garnishment process to be served upon Harry H. Hall residing in this Parish, and the Canal

Louisiana Bank & Trust Company and pr. annexed papers and it appearing by the annexed affidavit that due notice of this motion and of the time and place of making the same, together with affidavit of the service of injunction has been given to said Ephraim Simon:

Now, therefore, the Southern Railway Company Complainant herein by its Solicitors, Messrs. Hall & Monroe, move that the said Ephraim Simon stand committed for contempt of Court and that he be punished by fine and imprisonment for deliberately and intentionally violating the said injunction and order of this Court.

(Signed) HALL & MONROE, Sol.

Harry H. Hall, being sworn, says that the officers of the Southern Railway Company are absent from and do not reside in this State, and that he is their Solicitor and attorney for the purposes of this proceeding and affiant says, that, as appears by the return of the United States Marshal herein, a writ of injunction was served, personally upon Ephraim Simon, respondent on the 30th of June, 1905, and that the said Ephraim Simon, by his Solicitor and Counsel Mr. Henry L. Lazarus, has repeatedly notified affiant that he intended to cause and that he had caused his said client, said Ephraim Simon to violate the injunction herein above referred to by the issuance of a writ of fieri facias as hereinabove set out.

(Signed) HARRY H. HALL.

Sworn to and subscribed [to] before me, this 11th day of November, 1907.

(Signed) H. J. CARTER,

[Seal.] United States Commissioner.

86 State of Louisiana,

Civil Sheriff's Office, Parish of Orleans:

In the Civil District Court for the Parish of Orleans.

Ephraim Simon

versus

Southern Railway.

To Harry H. Hall, Garnishee, New Orleans:

Please to take notice, That by virtue of a writ of fi. fa. issued in the above mentioned suit, I seize in your hands, all the Goods, Chattels, Lands, Tenements, Rights and Credits, Moneys, Effects, Bills of Exchange, Promissory Notes or property of any kind which you may now or hereafter have in your possession or under your control belonging to defendant, Southern Railway Company, which you will hand over to me.

(Signed) CHAS. J. JACKSON,
Deputy Sheriff.

State of Louisiana:

Civil District Court for the Parish of Orleans, in the City of New Orleans.

No. 74869.

Ephraim Simon

versus

Southern Railway Co.

To Harry H. Hall, Garnishee, New Orleans:

You are Hereby Cited, to declare on oath, what property belonging to the Defendant in this case you have in your pos-

session or in what sum you are indebted to said Defendant and also to answer in writing under oath, the interrogatories annexed to the Supplemental Petition of which a copy accompanies this citation and deliver your answer to the same, in the office of the Clerk of the Civil District Court for the Parish of Orleans within ten days after the service hereof, otherwise judgment will be entered against you for the amount claimed by the plaintiff with interest and costs.

Witness, the Honorable W. B. Sommerville Judge of the said Court, the 8th day of November in the year if [of] our Lord, 1907.

(Signed) W. E. FEENEY,
Deputy Clerk.

[Seal.]

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No. 74869.

Ephraim Simon

versus

Southern Railway Co.

To the Honorable the Civil District Court for the Parish of Orleans:

The supplemental petition of Ephraim Simon, respectfully represents.

That he had obtained from the Clerk of this honorable Court a writ of fieri facias ordering the Sheriff of this Parish to seize and take into his possession the property, real and personal rights and credits of defendant Southern Railway Company and to cause to be made, in the manner prescribed by law, an amount sufficient to pay and satisfy the same viz: Thirteen thousand three hundred and forty eight ($13,348) Dollars with legal interest thereon from January 20, 1903, and costs of Court and having good reason to believe that the Canal Louisiana Bank & Trust Co. and Harry H. Hall third persons are indebted to said defendant or ha [have] property or effects in their possession or under their control belonging to said defendant.

Therefore, petitioner pray [prays] that said Canal Louisiana Bank and Trust Co. of New Orleans and Harry H. Hall of New Orleans, be made garnishee herein and ordered to answer under oath to accompanying interrogatories and after all due and legal proceedings, condemned to pay the amount of said Judgment interest and costs.

(Signed) LAZARUS, MICHEL and LAZARUS,

Attorney [Attorneys] for Petitioner.

Interrogatories to be Answered Categorically under Oath, in Writing, Ten Days from Service.

1st. Had you in your hands, or under your control, directly or indirectly, at the time of service of these interrogatories or at any time since, any money, rights, credits, or other property whatsoever, belonging or due to the said defendant in Writ or in which is [it] has or had any interest for the whole or for a part; and if yea, what is the nature, description and amount thereof, and is the same sufficient to pay or to satisfy the full amount of said Judgment interest and Costs or if less, to what amount—you being asked and required to make a full disclosure in relation to the same.

2d Interrogatory. Were you not, at the time of service upon you of these interrogatories, or since directly or indirectly indebted or obligated unto the said defendant in Writ for anything or for any sum whatever, whether for yourself alone or together with others, in consequence of any sale or exchange or transaction of any kind whatever, whether the same be due or to become due, and whether the interest of said defendant
88 in Writ be direct or indirect, or be for the whole or a part only or whether it be by bill, note or otherwise; and if yea, what is the nature description and amount thereof, and is the same sufficient to pay or satisfy the full amount of said Judgment, interest and Costs, or if less, what amount?—you being asked and required to make a full and detailed disclosure in relation to the same.

3d Interrogatory. Have you, at any time since the service of notice of seizure in your hands herein made, directly or indirectly, unto or with the said defendant in Writ any payment or innovation or compromise or arrangement or given it any note or written obligation, or received from it, directly or indirectly any receipt or acquittance? and if yea, state the nature, description and amount thereof, and the time, place and circumstances of the same.

(Signed) LAZARUS, MICHEL and LAZARUS,
Att'ys for Pet'r.

(On reverse side.)

Let this supplemental petition be filed and let Mr. Harry H. Hall and the Canal Louisiana Bank and Trust Company of New Orleans be made garnishee herein and ordered to answer the accompanying interrogatories, under oath; in writing, with [within] ten days from service and as the law directs as herein prayed for.

New Orleans, Nov. 8, 1907.

(Signed) W. B. SOMMERVILLE, Judge.

A true copy.

(Sig.) W. E. FEENEY,
D'y Cl'k.

[Seal.]

Marshal's Return on Motion to Punish for Contempt. Filed Nov. 12, 1907.

Received by U. S. Marshal, New Orleans, La., Nov. 11/07, 2.25 o'le [o'clock] P. M. and on the same day I served copy hereof on Judge H. L. Lazarus, Att'y of record by handing same to him in person in N. O. La.

(Signed) VICTOR LOISEL,
U. S. Marshal,

" By T. I. GALBRETH, D'y.

89 Return to Rule for Contempt. Filed November 15th, 1907.

U. S. Circuit Court, Fifth Circuit, Eastern District of Louisiana.

No. 13300.

Southern Railway Company

versus

Ephraim Simon.

The Answer of Ephraim Simon to a Rule Awarded Against Him by this Honorable Court.

To the Honorable the Judge of the Circuit Court of the United States for the Fifth Circuit, Eastern District of Louisiana:

By an order entered by this Court in the cause of the Southern Railway Company versus Ephraim Simon, summoning appearer to show cause why he should not be fined and imprisoned for disobeying the injunction heretofore awarded in said suit restraining him from proceeding against the complainant, the Southern Railway Company, in the cause depending in the Civil District Court for the Parish of Orleans, entitled Ephraim Simon versus Southern Railway Company, No. 74,869 of the docket thereof, or from issuing execution thereon or attempting thereunder to seize any property, movable or immovable, of complainant, or attempting in any manner to enforce the same, this respondent in answer to said summons, respectfully says:

That at all times, as in duty bound, he yields and submits himself to the orders and judgments of all courts when in the legitimate exercise of their power and jurisdiction, and this respondent protests his honesty of purpose in the assertion of his rights and disclaims any intention to treat the Court or its orders with disrespect, and here solemnly asseverates that he has been actuated alone with the desire to have the law of the land properly administered.

Respondent, for further answer, says, that he instituted a suit in the Civil District Court of the Parish of Orleans, State of Louisiana, against the Southern Railway Company for indemnification and recovery of damages suffered and sustained by him in consequence of a breach of contract upon the part of said defendant company; that the said Court in which the said cause was instituted, was seized of jurisdiction ratione materiæ et personæ: that all the material allegations necessary to support the cause of action and the judgment rendered thereon, were, by the trial Judge decreed to have been proved, and after the observance of all legal requirements, a judgment was entered of record awarding to appearer the measure of recovery sought by him in said proceedings, all of which will more fully and at large appear by the record of the Civil District Court in the
90 cause entitled Ephraim Simon versus the Southern Railway Company, No. 74,869 of the docket thereof, attached to, forming an exhibit in and constituting part of, mover's bill in the cause, reference to which is here craved and which he prays may be considered as part of this return.

This respondent further says that the Civil District Court for the Parish of Orleans, is a court of general jurisdiction created and organized under the Constitution and laws of the State of Louisiana and is co-ordinate with this Honorable Court in the exercise of the jurisdiction conferred on it by the Acts of Congress.

That subsequent to the rendition of the judgment aforesaid, the Southern Railway Company, asserting that it was a non-resident corporation, invoked the jurisdiction of this Court to restrain the execution of the judgment rendered by the Civil District Court in favor of appearer, and obtained a preliminary injunction from this Honorable Court restraining and enjoining this respondent from attempting to enforce the said judgment or issuing execution thereon; and that notwithstanding respondent's appearance at the Bar of this Court and pleading its want of power and jurisdiction to enjoin the execution of a judgment of the Civil District Court, this Honorable Court, in direct violation of a prohibitory statute of the United States, issued its injunction and attempted thereby to control the judgment and process of the Civil District Court of the Parish of Orleans, State

of Louisiana, and sought to deprive this appearer of the benefits and advantages of a judgment obtained by him in the State Court in due course of procedure, this Court thereby asserting its right of review and control of judgments of a State Court. This appearer further says that the rule herein taken and whereon complaint is made, is based upon proceedings taken by him in the execution of his said judgment, said proceedings being under the direct authority of the Honorable the Judge of the Civil District Court for the Parish of Orleans, who upon application of this respondent, granted an order of garnishment herein, with direction to those garnisheed to make due and proper return in accordance with law, all of which will more fully and at large appear by reference to a certified copy of said order hereto annexed and made part hereof as Exhibit A.

This appearer, for further answer to the summons herein says: That this Honorable Court is without power or jurisdiction to issue a writ of injunction to stay proceedings in any Court of this State, and being without power or jurisdiction to issue the writ, its breach does not constitute and cannot be construed as a contempt of the authority of this Honorable Court, and this he submits to the Court as his return for the acts herein complained of, this respondent being advised and believing that this Court was without power or authority to award the writ of injunction enjoining the execution of appearer's judgment against the Southern Railway Company; that to this return, and with the exhibit hereto annexed, he makes the record in this cause a part of his said return, and prays the Court's consideration of the same.

Supported by appearer's oath to the return made herein, he prays that the rule taken herein be discharged, and
91 that he be at liberty to pursue his legal rights in the Courts of the State of Louisiana, as he may be advised.

(Signed) EPHRAIM SIMON.
(Signed) HENRY L. LAZARUS.
(") H. MICHEL,
(") ELDON S. LAZARUS.
(") DAVID SESSLER.
Solicitors and of Counsel.

U. S. Circuit Court, Fifth Circuit, Eastern District of Louisiana.

No. 13300.

Southern Railway Company

versus

Ephraim Simon.

State of Louisiana, Parish of Orleans:

Ephraim Simon, being duly sworn, deposes and says, that the foregoing is his return to the summons issued herein; that all the facts stated therein of his own knowledge, are true; that those upon information and belief, he believes to be true; and that he avowedly disclaims any intention of disrespect to the authority of this Court.

(Signed) EPHRAIM SIMON.

Sworn to and subscribed before me this 15 day of November, 1907.

(Signed) H. J. CARTER,
U. S. Commissioner.

I certify that in my opinion the return made herein is good and sufficient in law.

(Signed) HENRY L. LAZARUS,
Of Counsel.

Nov. 15, '07.

Exhibit A to E. Simon's Return to Rule for Contempt.

Filed Nov. 15, 1907.

State of Louisiana for the Parish of Orleans:

Ephraim Simon

versus

Southern Railway Co.

State of Louisiana to the Sheriff of the Parish of Orleans, Greeting:

We command you, That by seizure and sale of the property, real and personal rights and credits of defendant South-

92 ern Railway Company in the manner prescribed by law, you cause to be made the sum of thirteen thousand three hundred and forty eight dollars with legal interest thereon from date of Judgment until paid and for all costs and also the sum of fifteen 70/100 Dollars costs as well as your own costs, and charges to satisfy a judgment rendered against the said defendant Southern Railway Company, in our Civil District Court for the Parish of Orleans 16th day of January, 1905, in favor of Plaintiff Ephraim Simon and how you shall have executed this writ, you make return to our said court (within seventy days) according to law.

Witness, the honorable T. C. W. Ellis, F. D. King, Geo. H. Theard, John St. Paul, W. B. Sommerville, Judges of our said Court, this 8th day of November in the year of out [our] Lord, 1907.

(Signed) W. E. FEENEY,
Deputy Clerk.

A true copy.

(Signed) L. W. GUNTHER,
[Seal.] D'y Cl'k.

No. 74869.

Ephraim Simon

versus

Southern Railway Co.

To the Honorable the Civil District Court for the Parish of Orleans, Div. "D":

The supplemental petition of Ephraim Simon respectfully represents;

That he has obtained from the Clerk of this Honorable Court a writ of fieri facias ordering the Sheriff of this Parish to seize and take into his possession the property real and personal rights and credits of defendant Southern Railway Company and to cause to be made, in the manner prescribed by law, an amount

sufficient to pay and satisfy the same, viz: Thirteen thousand three hundred forty eight ($13348) Dollars with legal interest thereon from January 20, 1905 and costs of court and having good reasons to believe that the canal Louisiana Bank & Trust Co. and Harry Hall third persons are indebted to said defendant or have property or effects in their possession or under their control belonging to said defendant. Therefore, petitioner prays that said Canal Louisiana Bank & Trust Co., of New Orleans and Harry H. Hall of New Orleans be made garnishee herein, and ordered to answer under oath to accompanying interrogatories, and after all due and legal proceedings condemned to pay the amount of said Judgment interest and costs.

(Signed) LAZARUS, MICHEL & LAZARUS,
Attorneys for Petitioner.

93 Interrogatories to be Answered Categorically Under Oath, in Writing, Ten Days from Service.

1st. Had you in your hands or under control directly or indirectly at the time of service of these interrogatories, or at any time since any money, rights, credits, or other property whatsoever belong- [belonging] or due to the said defendant in writ or in which it has or had any interest for the whole or for a part; and if yea what is the nature, description and amount thereof and is the same sufficient to pay or to satisfy the full amount of said Judgment, interest & costs or if less, to what amount. You being asked and required to make a full disclosure in relation to the same.

2nd. Interrogatory: Were you not, at the time of service upon you of these interrogatories or since directly or indirectly indebted or obliged unto the said defendant in writ for anything or for any sum whatever, whether for yourself alone or together with others, in consequence of any sale or exchange or transaction of any kind whatever, whether the same be due or to become due, and whether the interest of said defendant in writ be direct or indirect, or be for the whole or a part only or whether it be by bill, note or otherwise; and if yea, what if [is] the na-

ture, description and amount thereof, and is the same sufficient to pay or satisfy the full amount of said Judgment, interest and costs, or if less, what amount?—you being asked and required to make a full and detailed disclosure in relation to the same.

3d. Interrogatory: Have you, at any time since the service of notice of seizure in your hands herein made, directly or indirectly, unto or with the said defendant in writ any payment or innovation or compromise, or arrangement or given it any note or written obligation, or received from it directly or indirectly any receipt or acquittance? and if yea, state the nature, description and amount thereof, and the time, place and circumstances of the same.

(Signed) LAZARUS, MICHEL & LAZARUS,
Att'ys for Pet'r.

A true copy.

L.W. GUNTHER,
[Seal.] Dy. Clerk.

Nov. 7, 1907.

(On reverse side.)

Let this supplemental petition be filed, and let Mr. Harry H. Hall and the Canal Louisiana Bank and Trust Company, of New Orleans, La., be made garnishee herein, and ordered to answer the accompanying interrogatories, under oath; in writing, within ten days from service and as the law directs as herein prayed for.

New Orleans, Nov. 8, 1907.

(Signed) W. B. SOMMERVILLE,
Judge.

No. 74869, Div. "D." Civil District Court,—Ephraim Simon vs. Southern Railway Co.,—Lazarus, Michel & Lazarus, Attorneys.—Filed Nov. 8th, 1907. (Signed) W. E. Feeney, Deputy Clerk.

94 State of Louisiana:

Civil District Court for the Parish of Orleans, in the City of New Orleans.

No. 74869.

Ephraim Simon

versus

Southern Railway Co.

To Harry H. Hall, Garnishee, New Orleans:

You are hereby cited, to declare on oath, what property belonging to the Defendant in this case you have in your possession or in what sum you are indebted to said Defendant, and also, to answer in writing under oath, the interrogatories, annexed to the supplemental petition of which a copy accompanies this citation and deliver your answer to the same, in the office of the Clerk of the Civil District Court for the Parish of Orleans, within ten days after the service hereof, otherwise judgment will be entered against you for the amount claimed by the plaintiff with interest and costs.

Witness the Honorable W. B. Sommerville, Judge of the said Court, the 8th day of November in the year of our Lord, 1907.

(Signed) W. E. FEENEY,

Deputy Clerk. [Seal.]

A true copy.

(Sig.) L. W. GUNTHER,

[Seal.] Dy. Clerk.

On reverse side.

I served a copy of the within Citation and accompanying supplemental petition and interrogatories on Harry H. Hall Garnishee herein in person.

Returned same day.
Sheriff's fees $1.50.

(Signed) C. M. GOSS,
Deputy Sheriff.

No. 74869, Civil District Court for the Parish of Orleans,—Ephraim Simon vs. Southern Railway Co.—Lazarus, Michel & Lazarus, Attorney. Copy of Supplemental Petition, Interrogatories and Citation inside to be served on Garnishee, See inside.—Received Friday Nov. 8th, 1907 and on the 8th day of November, 1907 at 2:30 P. M.—Filed Nov. 14, 1907 (Signed) L. W. Gunther, Dy. Clerk.

95 State of Louisiana:

Civil District Court for the Parish of Orleans, in the City of New Orleans.

No. 74869.

Ephraim Simon

versus

Southern Railway Co.

To the Canal Louisiana Bank and Trust Company through its proper officers, Garnishee, New Orleans:

You are hereby cited to declare on oath, what property belonging to the Defendant in this case you have in your possession, or in what sum you are indebted to said Defendant, and also to answer in writing under oath the interrogatories annexed to the supplemental Petition of which a copy accompanies this cita-

tion, and deliver your answer to the same, in the office of the Clerk of the Civil District Court for the Parish of Orleans, within ten days after service hereof, otherwise judgment will be entered against you for the amount claimed by the plaintiff with interest and costs.

Witness the Honorable W. B. Sommerville, Judge of the said Court, the 8th day of November in the year of our Lord, 1907.

(Signed) W. E. FEENEY,
Deputy Clerk. [Seal.]

A true copy.

(Signed) L. W. GUNTHER,
[Seal.] Dy. Clerk.

On reverse side.

Received Friday Nov. 8th, 1907, and on the 8th day of November 1907 at 2:10 P. M. I served a copy of the within Citation and accompanying supplemental petition and interrogatories on the Canal Louisiana Bank and Trust Company Garnishee herein by personal service on R. M. Walmsley, its President.

(Signed) C. M. GOSS,
Deputy Sheriff.

Returned same day.
Sheriff's fees $1.50.

No. 74869—Civil District Court, for the Parish of Orleans.—Ephraim Simon vs. Southern Railway Co.—Lazarus, Michel & Lazarus, Attorneys. Copy of Supplemental Petition, Interrogatories and Citation inside to be served on Garnishee, See inside. Filed Nov. 14, '07. Signed L. W. Gunther, Dy. Clerk.

96 Civil District Court, Div. "D."

No. 74869.

Ephraim Simon

vs.

Southern Railway Company.

Now into Court comes the Canal-Louisiana Bank & Trust Company of New Orleans, made garnishee herein, and to the interrogatories herein propounded to it, says and answers as follows:

To the first interrogatory, it answers: No.
To the second interrogatory, it answers: No.
To the Third interrogatory, it answers: No.

Wherefore your said garnishee and respondent prays to be hence dismissed with costs, and for all general and equitable relief.

CANAL-LOUISIANA BANK & TRUST COMPANY,

(Signed) By R. M. WALMSLEY,
President.

(Signed) MILLER, DUFOUR & DUFOUR,
Attorneys.

State of Louisiana:
Parish of Orleans:

Robert M. Walmsley, being duly sworn, deposes and says:

That he is the President of the Canal Louisiana Bank & Trust Company of New Orleans, and that the foregoing answers are true and correct, so help him God.

(Signed) R. M. WALMSLEY.

Sworn to and subscribed before me this 9th day of November, 1907.

(Signed) JOHN JANVIER,

[Seal.] Notary Public.

A true copy.

(Signed) L. W. GUNTHER,

[Seal.] Deputy Clerk.

Endorsed: No. 74869 Civil District Court Div. D—Ephraim Simon vs. Southern Railway Co.—Answer to interrogatories Canal-La. B. & T. Co.—Filed Nov. 11,/07. Signed L. W. Gunther. Dy. Clk. Miller, Dufour & Dufour.

97 Civil District Court, Division D.

No. 74869.

Ephraim Simon

vs.

Southern Railway Company.

And now into Court comes Harry H. Hall upon whom notice of seizure, garnishment process and interrogatories herein were served on the 8th day of November 1907, and for answer thereto and to the said interrogatories says:

That he did not have at the time of said service, nor has he had since any property, movable or immovable of any kind whatsoever in his possession or under his control belonging to the defendant company nor is he in any manner indebted unto the said defendant company nor is he in any manner indebted unto the said defendant and he further answers the said interrogatories categorically.

To Interrogatory No. 1, he says: No.
To interrogatory No. 2, he says: No.
To Interrogatory No. 3, he says: No.
To interrogatory No. 4, he says: No.

Harry H. Hall being duly sworn says that the foregoing answers are true.

(Signed) HARRY H. HALL.

Sworn to and subscribed to before me this 13th day of November 1907.

(Signed) L. W. GUNTHER,
[Seal.] D'y Cl'k Civil Dist. Court.

A true copy.

(Sig.) L. W. GUNTHER,
[Seal]. Deputy Clerk.

Endorsed: No. 74869, Civil District Court, Division D. Ephraim Simon vs. Southern Railway Co. Answer to garnishment, Filed Nov. 13/07 Signed L. W. Gunther, D'y Clerk. Hall & Monroe, Att'ys.

98 Proceedings and Note of Evidence on Behalf of Complainant. Filed November 15, 1907.

In the Circuit Court of the United States for the Eastern District Of Louisiana.

No. 13300.

Southern Railway Co.

vs.

Ephraim Simon.

On the Motion Made by Complainant Southern Railway Company to Punish Defendant for Contempt.

Proceedings and offerings had in the above numbered and entitled cause on the trial of the above motion before the Honorable Eugene D. Saunders, United States District Judge, on Friday, November 15th, 1907, on behalf of plaintiff.

Appearances.

Harry H. Hall, Esq., appearing for the Southern Railway Co., Henry L. Lazarus, Esq., and David Sessler, Esq., for Ephraim Simon, Respondent.

By Mr. Hall: On the motion to commit for contempt, Solicitors for the Southern Railway Company offer in evidence:

1. The original bill, demurrer, the plea, the answer herein, and further, the entire record, and the evidence therein.

And offer particularly, the restraining order herein rendered on November 6th, 1905, and signed by Judge Charles Parlange;

Also the preliminary injunction issued on the 9th of June 1906 under a judgment rendered on that day, and signed by Judge Parlange;

The bond for $2000 given in conformity with that judgment;

The reasons, and the opinion given by Judge Parlange, for issuing that injunction.

The writ of injunction or the mandate of injunction, bearing date June 30, 1905, together with the return by the United States Marshal showing service in person on Ephraim Simon on that day;

The fi fa docket of the Civil District Court showing—or rather that part of it showing the application made by counsel for Ephraim Simon for the issuance of writs of fieri facias.

The writ of fieri facias;

The notice of seizure served upon Harry H. Hall, together with garnishment process and interrogatories served on him and addressed to him and the Canal-Louisiana Bank & Trust Company,—all these proceedings being in suit No. 74869 of the docket of the Civil District Court for the Parish of Orleans in the case of Ephraim Simon vs. Southern Railway Company.

99 Agreement.

It is agreed by and between counsel for the respective parties herein that no appeal has been taken in this proceedings,—Southern Railway Company vs. Ephraim Simon, No. 13,300—

either from the restraining order or the preliminary injunction, and that the matter now stands pending before this court on the final answer.

Whereupon mover rested.

Proceedings and Note of Evidence on Behalf of Defendant.

Filed Nov. 15, 1907.

In the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana.

No. 13300.

Southern Railway Company.

vs.

Ephraim Simon.

On Motion for Contempt Taken by Southern Railway Co.

Proceedings and offerings had in the above numbered and entitled cause on the trial of the above motion before the Honorable Eugene D. Saunders, United States District Judge, Presiding, on Friday, November 15th, 1907, on behalf of defendant.

Appearances.

Harry H. Hall, Esq., appearing for the Southern Railway Co.; Henry L. Lazarus and David Sessler, Esq. for Ephraim Simon, Respondent.

Offerings by Judge Lazarus: I offer, in connection with the evidence tendered by Solicitor for Southern Railway Company, and supplemental thereto, the exhibits referred to in the bill of complaint, and particularly the record of the Civil District Court for the Parish of Orleans, in the case entitled "Ephraim Simon vs. Southern Railway Company No. 74869," of said court.

And I offer particularly and especially in evidence, the order signed by Honorable W. B. Sommerville, Judge of the Civil District Court for the Parish of Orleans, upon the supplemental petition of Ephraim Simon, ordering garnishment process herein, all in accordance with the statute laws of Louisiana.

Admission.

It is admitted that W. B. Sommerville, is one of the Judges of the Civil District Court for the Parish of Orleans, State of Louisiana, and that he was a judge of the Civil District
100 Court at the time of the proceedings No. 74869 of the docket of said court, and that he presided, as judge of said court, in the conduct of said proceedings, and that he signed the judgment rendered in said cause.

Whereupon the defendant rested.

Reasons for Judgment on Motion of Complainant to Have Defendant Punished for Contempt.

Filed November 15th, 1907.

In the Circuit Court of the United States for the Eastern District of Louisiana.

No. 13300.

Southern Railway Company

vs.

Ephraim Simon.

On Motion of Southern Railway Co. to Punish Defendant for Contempt.

Saunders, J. (orally):

The defendant in the present case, Ephraim Simon, obtained a judgment in the Civil District Court for the Parish of Orleans against the plaintiff in this case, the Southern Railway

Company. After that judgment had become final in the Civil District Court, the Southern Railway Company instituted the present suit in this court to annul the judgment of the Civil District Court for the Parish of Orleans against it and in favor of said Simon. The ground on which the nullity herein is demanded is that the Southern Railway Company was not cited to appear and did not appear in the proceedings in the Civil District Court, and it is claimed that, for that reason, the judgment of the Civil District Court should be annulled.

Under the sections of the Code of Practice of Louisiana which treat of the nullity of judgments, namely Sections 604, 613, it is provided that,

"The defendant against whom a judgment has been rendered, may institute proceedings to have that judgment annulled wherever the defendant was not cited and did not appear." (See Art. 605.)

The proceedings to annul a judgment, is a distinct and separate suit from the proceeding in which the judgment itself is rendered. It does not, in any way, grow out of the proceeding in which the judgment was rendered, but is an independent proceeding whereby the result of the original suit is attacked. It is true that in the State courts the suit to annul must be filed in the same court and in the same proceeding in which the judgment attacked, was rendered. This is a mere matter of distributing jurisdiction in a State court. Essentially, the proceeding to attack and avoid the judgment, is an independent suit. Where the requisite diversity of citizenship exists, this suit may be brought in the Federal court as well as in the State court.

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It is apparent to me, therefore, that this court had jurisdiction to entertain the demand of the plaintiff herein to annul the judgment of the state court in favor of the defendant herein. In the exercise of that jurisdiction, this court, in June, 1905, rendered an order authorizing the issuance of a preliminary injunction restraining the defendant Simon from executing the judgment he had obtained in the Civil District Court for the Parish of Orleans. Pending the trial of this case, Simon took no appeal from that order which is now final and unappealable as an interlocutory order in this case.

In this situation I can see no reason or justification on the part of the defendant, Simon, for disregarding the injunction, and I, therefore, hold that he is in contempt of this court in disregarding the injunction and in attempting to enforce the judgment of the Civil District Court for the Parish of Orleans which he has been enjoined by this court from attempting to enforce, and the only thing that remains for me to do is to enforce jurisdiction of this court by punishing defendant Simon for contempt.

Counsel for defendant, however, insists that the proceedings taken by him, is a proper way for carrying this matter before the Supreme Court, for the determination by that tribunal of the jurisdiction of this court to issue the injunction. I have no doubt that this statement is made in entire good faith, and I shall, therefore, consider that fact in the sentence that I am about to impose.

The rule will be made absolute, and it is ordered that the defendant at once release the seizure and desist from the proceedings which he has taken in the Civil District Court for the Parish of Orleans to enforce the judgment originally obtained by him in that court, and from the enforcement of which he was enjoined in this court in this proceeding, and that if this is not done completely and entirely by Thursday, the 21st day of November, next, at eleven o'clock A. M., then the defendant shall pay a fine of One hundred dollars and shall stand committed in the Parish Prison for ten days for contempt, of this court; and the defendant shall, in the meantime, stand committed in the custody of the marshal of this court.

Counsel for defendant, since the foregoing was dictated, have called my attention to the case of Ex Parte Davis, 112 Fed. Rep. p. 139, in which the Circuit Court of Appeals of this Circuit, have held that courts have the power to fine or imprison for contempt, but cannot do both.

With my attention attracted now to that decision, the foregoing order is changed so as to read:

The defendant Ephraim Simon is hereby fined the sum of One hundred dollars for contempt of this court, and that he stand

forthwith committed to be imprisoned in the Parish
102 Prison for the Parish of Orleans until said fine is paid, and accordingly, the marshal of this court is ordered at once to take the said defendant, Ephraim Simon, in custody until the fine hereby imposed is said [paid].

(Signed) E. D. SAUNDERS,
Judge.

Nov. 15, 1907.

Hearing and Judgment upon Motion of Complainant to Have Defendant Punished for Contempt.

Extract from the Minutes of November 15th, 1907.

No. 13300.

U. S. Circuit Court, Eastern District of Louisiana.

The Southern Railway Company

vs.

Ephraim Simon.

This cause came on this day to be heard upon the Motion of the Complainant filed herein on November 11th, 1907, to have the defendant Ephraim Simon, committed and punished for contempt of this Court for the reasons set forth in said Motion.

Present: Harry H. Hall, Esq., Solicitor for the Complainant, H. L. Lazarus and David Sessler, Esqrs., Solicitors for the defendant, and the defendant Ephraim Simon in person.

Counsel for Complainant then read to the Court the Motion, and the Counsel for the defendant read his Answer to the same; thereupon Counsel for the respective parties offered evidence and the matter was argued.

Whereupon and upon consideration thereof, it is now ordered, for the written reasons on file, that the defendant, Ephraim Simon, is hereby fined the sum of One Hundred Dol-

lars for contempt of this Court and that he stand forthwith committed to be imprisoned in the Parish Prison for the Parish of Orleans until said fine is paid, and accordingly, the Marshal of this Court is ordered at once to take the said defendant, Ephraim Simon, in custody until the fine hereby imposed is paid.

November 15th, 1907.

103 Marshal's Return. Filed November 16, 1907.

In the Circuit Court of the United States for the Eastern Dist. of New Orleans.

No. 13300.

The Southern Railway Company

vs.

Ephraim Simon.

I certify that the defendant, Ephraim Simon is, at the time of signing hereof in my custody for being in contempt of Court, and under order of the Judge of said Court is to remain in my custody until the fine imposed is paid.

(Signed) VICTOR LOISEL,
U. S. Marshal,

By T. I. GALBRETH,
Deputy U. S. Marshal.

New Orleans, Louisiana, November 15th, 1907.

104 Proceedings in U. S. Supreme Court for Writs of Habeas Corpus and Certiorari, Offered by Both Parties, With Printed Transcript of Appeal, Before Master, April 16, 1909, Filed in Court January 6, 1910.

Supreme Court of the United States.

October Term, 1907.

Ex Parte: In the Matter of Ephraim Simon, Petitioner.

Motion for Leave to File Petition.

Ephraim Simon, a citizen of the State of Louisiana, now in the custody of the United States marshal under orders of the honorable the Circuit Court of the United States for the Eastern District of Louisiana, and restrained of his liberty for an alleged violation of an injunction issued by the United States Circuit Court for the Eastern District of Louisiana, on an original bill filed in said court by the Southern Railway Company, enjoining the said Ephraim Simon from enforcing or executing a judgment in his favor rendered by the State courts of Louisiana, moves for permission to file his petition in this court for relief by habeas corpus from further detention and restraint under an order of commitment entered in a cause by a court without jurisdiction and in direct violation and disregard of section 720 of the Revised Statutes of the United States.

HENRY L. LAZARUS,
Counsel for Petitioner.

Washington, D. C., November 18, 1907.

[Endorsed:] No. — Supreme Court of the United States. Ex parte: In the matter of Ephraim Simon, petitioner. Motion for leave to file petitions for writs of habeas corpus and certiorari. Filed —— —. —— ——, clerk. Lazarus, Michel & Lazarus, attorneys for petitioner, 830 Common street, New Orleans.

105 Supreme Court of the United States.

October Term, 1907.

Ex Parte: In the Matter of Ephraim Simon, Petitioner.

Petition for Writs of Habeas Corpus and Certiorari.

To the Honorable the Supreme Court of the United States:

Your petitioner, Ephraim Simon, a citizen of the State of Louisiana and a resident of the parish of Orleans, State of Louisiana, respectfully shows that he is unlawfully held in custody, imprisoned, and restrained of his liberty by the marshal of the United States for the Eastern District of Louisiana, at New Orleans, the said marshal acting under and by virtue of the authority of the judge of the United States Circuit Court for the Eastern District of Louisiana.

Your petitioner further states that in a proceeding pending in the United States Circuit Court for the Eastern District of Louisiana, entitled Southern Railway Company versus Ephraim Simon, No. 13300 of the docket of said court, an injunction was issued upon the application of complainant in said cause, enjoining petitioner from issuing execution upon a judgment obtained by him in the State courts of Louisiana, or attempting thereunder to seize any property, movable or immovable, of the Southern Railway, complainant, or attempting in any manner to enforce the same; that the honorable the Circuit Court of the United States for the Eastern District of Louisiana, being without power or authority to issue said injunction and the issuance hereof, being in disregard of the statutory prohibition of the United States, was inoperative and void, and therefore without effect, and your petitioner had the right to pursue his legal remedies in the courts of his State, which were first seized of juris-

106 diction and which entitled him in the pursuit of said rights to the enforcement of his judgment; that petitioner caused to be issued his writ of execution, and in furtherance thereof the Honorable W. B. Sommerville, one of the judges of the Civil District Court for the Parish of Orleans, State of Louisiana, and who had exclusive jurisdiction of the judgment obtained by your petitioner against the South-

ern Railway Company in said court, directed, under his signature and the seal of said court, the issuance of a writ of garnishment directing the seizure of the property and effects of the Southern Railway Company, the defendant in said cause; that thereupon the said Southern Railway Company caused to be issued by the United States Circuit Court for the Eastern District of Louisiana a summons, directed to your petitioner, to show cause why he should not be punished for contempt for breaching the injunction of said court restraining your petitioner from the enforcement of his judgment against the Southern Railway Company obtained by him in the State courts of Louisiana; that thereupon your petitioner made due return to said summons, and, disclaiming any intention of disrespect in the disobedience of the writ for which he was sought to be held in contempt, he challenged and denied the power and jurisdiction of the court to issue the writ, and contended that its violation did not constitute a contempt of the authority of said court; and that thereupon, after hearing the return to the said summons, the said honorable United States Circuit Court, acting through Honorable E. D. Saunders, presiding judge, committed your petitioner for contempt for the alleged violation of the injunction aforesaid; all of which will more fully and at large appear by reference to the record in said cause, hereto attached and made part hereof, embracing the exemplification of record of the State court, the summons to show cause for the breach of the injunction, the return thereon, and the action of the court upon said summons and return.

107 Your petitioner further states and alleges, as he is advised, that the honorable the Circuit Court of the United States for the Eastern District of Louisiana had no jurisdiction or lawful authority to cause the arrest of your petitioner, nor to proceed against him in manner and form aforesaid, and that the said pretended process, arrest, order, judgment, and warrant issued in pursuance thereof, whereby your petitioner was committed to the custody of the said United States marshal of said United States Circuit Court for the Eastern District of Louisiana, and whereby and in pursuance of the authority of which he is held in custody of the said United States marshal and imprisoned and restrained of his liberty, as aforesaid, were and are, each and all of them, wholly without authority of law,

in violation of law and of the just rights of your petitioner, and void.

Your petitioner further represents that, as appears by a certified copy of the record hereto annexed, he instituted his suit in the Civil District Court for the Parish of Orleans for indemnification and recovery of damages suffered and sustained by him in consequence of a breach of contract on the part of said Southern Railway Company; that the said Civil District Court is a court of general jurisdiction organized under the constitution and laws of the State of Louisiana; that under the constitution and laws his cause instituted against the Southern Railway Company was duly allotted to Division "D" of said court, presided over by the Honorable W. B. Sommerville, who, under and by virtue of the constitution and laws of the State of Louisiana, is charged with exclusive jurisdiction of said cause from its inception until its final determination; and that the division of said court to which this cause was allotted in accordance with law was seized of jurisdiction of said controversy ratione materiæ et personæ; that, after service of due process in accordance with the laws of the State of Louisiana, the cause came on regularly to be heard and was tried before the Hon-
108 orable W. B. Sommerville, presiding judge, and a jury duly empaneled and sworn, and in due course of procedure a verdict was rendered in favor of your petitioner, and upon said verdict, in accordance with the laws of Louisiana, a judgment was entered which after the lapse of the legal delays provided for by statute, was duly signed and made executory; that thereupon said Southern Railway Company, by its independent suit, invoked the jurisdiction of the United States circuit court on the ground of diverse citizenship, and, reciting in its bill of complaint various causes for the annulment of said judgment, applied for and obtained a temporary injunction, directed against your petitioner, from issuing execution upon said judgment or attempting thereunder to seize any property, movable or immovable, of the complainant, the Southern Railway Company, or attempting in any manner to enforce the judgment which your petitioner had obtained in the State court; that the jurisdiction of the United States circuit court was, by demurrer and plea, as well as by answer, challenged and denied, and that the right to issue the writ of injunction enjoining the execution by petitioner of his judgment so obtained by him in

the State court was specially and particularly pleaded as being in derogation of the fundamental law and in violation of section 720 of the Revised Statutes of the United States, which lays its prohibition upon all courts of the United States from issuing execution to stay proceedings in any court of the State; that, notwithstanding said prohibition, the said injunction has been held in operation against your petitioner by said United States circuit court, and because of its violation proceedings for contempt were taken, as hereinbefore recited, and your petitioner held in custody under the order of said United States circuit court for breach of the injunction which it was without power or jurisdiction to issue; all of which will more fully and at large appear by a certified copy of the record of the United States circuit court in the case entitled Southern Rail-
109 way Company versus Ephraim Simon, No. 13300 of the docket of said court, hereto attached and made part hereof.

Wherefore petitioner prays that a writ of habeas corpus may be issued out of and under the seal of this honorable court, to be directed to the said United States marshal of the Circuit Court of the United States for the Eastern District of Louisiana, commanding him to have the body of your petitioner, together with return of the date and cause of his detention, before this honorable court on a day to be designated therein, and that a writ of certiorari issue, directed to the said judges of the United States Circuit Court for the Eastern District of Louisiana, and commanding them to certify and send to this court, on a certain day to be therein designated, a full and complete transcript of the process, record, and proceedings by and before them touching the matter of your petitioner's said arrest, detention, and imprisonment; and that your petitioner may have such other or full and adequate relief in the premises as to this court may seem appropriate, and that he may be discharged from said custody and imprisonment; and your petitioner prays for all further and necessary orders in the premises, and for general relief.

EPHRAIM SIMON,
Petitioner.

HENRY L. LAZARUS,
Counsel for Petitioner.

110 Supreme Court of the United States.

October Term, 1907.

Ex Parte: In the Matter of Ephraim Simon, Petitioner.

Petition for Writs of Habeas Corpus and Certiorari.

State of Louisiana,

Parish of Orleans, City of New Orleans, ss:

Ephraim Simon, being duly sworn, deposes and says that he is the petitioner above named; that he has read the foregoing petition by him subscribed and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated to be on his information and belief, and as to those matters he believes it to be true.

EPHRAIM SIMON.

Subscribed and sworn to before me this 16 day of November, 1907.

[Seal Henry J. Carter, United States Commissioner, Eastern District of Louisiana.]

H. J. CARTER,
United States Commissioner.

Supreme Court of the United States.

October Term, 1907.

No. ——.

Ex Parte: In the Matter of Ephraim Simon, Petitioner.

Petition for Writs of Habeas Corpus and Certiorari.

On consideration of the petition of Ephraim Simon and on motion of Henry L. Lazarus, of counsel for the petitioner,

It is now here ordered that the judges of the Circuit Court of the United States for the Eastern District of Louisiana show cause before this court on Monday, the — day of ——, A. D. 19—, at 12 o'clock, noon or as soon thereafter as
111 counsel can be heard, why a writ of habeas corpus and a writ of certiorari should not issue therein, to the end that the petitioner may be discharged from custody, or that he may have such other or further relief as shall seem just.

Supreme Court of the United States.

October Term, 1907

No. ——.

Ex Parte: Ephraim Simon, Petitioner.

On consideration of the petition filed by Mr. Henry L. Lazarus, of counsel, in behalf of the petitioner, it is considered, ordered, and adjudged by this court that a writ of habeas corpus be issued, directed to the marshal of the United States for the Eastern District of Louisiana, commanding him to have the body of the said Ephraim Simon with the day and cause or causes of his detention, before this court on the — day of ——, 19—, to do, receive, and submit to all and singular those things which the court shall consider concerning him in this behalf, and to have then and there this writ, with his doings thereon.

And it is further ordered by this court that a writ of certiorari do issue, to be directed to the judges of the Circuit Court of the United States for the Eastern District of Louisiana, requiring and commanding them that they do send, under the seal of the said United States circuit court, a full, true, and complete transcript of the proceedings had in said court in said cause, together with all things touching the same, to this court on the — day of ——, 19—.

And it is further ordered that all proceedings in said court in this case be stayed until the further order of this court made in the premises.

[Endorsed:] No. —. Supreme Court of the United States. Ex parte: In the matter of Ephraim Simon, petitioner. Petition for writs of habeas corpus and certiorari. Filed ——. —— ——, clerk. Lazarus, Michel & Lazarus, attorneys for petitioner, 830 Common street, New Orleans.

112 Motion to Set for Hearing.

Filed February 1, 1908.

U. S. Circuit Court

No. 13300

Southern Railway Company

vs

Ephraim Simon

On motion of Hall & Monroe of Counsel for Plaintiff, it is ordered that this cause be set for hearing.

113 Petition to Enlarge Time.

Filed February 19 1908.

U. S. Circuit Court Eastern District of Louisiana

No. 13300

Southern Railway Company

vs

Ephraim Simon

To the Honorable the Judges of the Said Court.

The petition of the Southern Railway Company with respect represents:

That it desires to enlarge the time for taking testimony and for the issuance and return of commissions herein and that, as stated in the annexed affidavit, it makes this application by reason of the fact, solely, that it was prevented from acting earlier by what appears to be a misunderstanding of Counsel.

Wherefore, petitioner prays that the time allowed to these parties for taking testimony and issuing and having return of commissions be enlarged for three months from this date, and for all general relief.

(Signed) HALL & MONROE

Solr.

HARRY H. HALL being sworn, says that he is one of the Solicitors for the Complainant; that he has always been prepared to have this cause pushed to a speedy trial and termination, but that many applications for delay have been urged by the Solicitor for Respondent, who has, likewise, obtained delays from the Court in which to plead or answer.

Further your affiant says that, after the cause herein was put at issue by the replication herein filed in August last, the Solicitor for the Respondent stated that he desired to file an application in the Supreme Court of the United States for a habeas corpus, for the purpose of promptly determining the issues raised in this case, and that the said application was filed in the Supreme Court, in November 1907, and was heard and filed and determined by the Supreme Court on
114 the 20th day of Jany. 1908; that pending the said application, which Solicitor for Complainant believed would terminate said litigation, it was not deemed desirable by either party thereto, to take testimony or to issue commissions.

That affiant suggested to the Solicitor for Respondent that, should the cause go to a final hearing, it might be properly heard upon the affidavits on file which were full and could hardly be made more effective by the examination of witnesses;

That affiant understood, and was justified in understanding, that this suggestion was acceptable to the Solicitor for Respond-

ent, who, however, stated that he desired to offer in evidence a joint lease of the New Orleans Terminal Company and of the St. Louis & San Francico [Francisco] R. R. Co. and the Southern Railway Company and that affiant undertook to procure this lease.

Further, affiant says that, on Saturday last, it was suggested to him by Respondent's Solicitor that he set the cause for hearing, upon the bill and answer, and, upon his declining to do so, suggesting that, as understood, the cause should be heard upon the affidavits on file, Solicitor for Respondent stated that he did not so understand the matter, and that he was not willing to thus submit the case.

For these reasons, affiant declares that it is necessary to enlarge the time for taking testimony and issuing commissions and having the same returned herein.

(Signed) HARRY H. HALL

Sworn to and subscribed to before me, this 19 day of May 1908.

(Signed) H. J. CARTER

U. S. Commissioner

Order.

The foregoing petition, prayer and affidavit considered, let the time for the taking of testimony herein and for the issuance and return of commissions and depositions be enlarged and entended [extended] to the 20th of May 1908.

Feb. 19, 1908.

(Signed) EUGENE D. SAUNDERS

Judge.

115 Petition and Order to Enlarge Time for Taking of Testimony and Issuance and Return of Commissions.

Filed June 2, 1908.

United States Circuit Court Eastern District of La.

No. 13300

Southern Railway Company

vs

Ephraim Simon

To the Honorable the Judges of the Said Court.

The petition of the Southern Railway Company herein represented by its President, W. W. Finley, with respect represents:

That in or about February last, it applied to this Court and obtained an order to enlarge the time for the taking of testimony and for the issuance and return of a commission herein; that upon notifying opposing Counsel of its intention so to do, the said Counsel reasserted his willingness to submit this cause upon the affidavits now on file and others to be added and upon such additional testimony as they might desire to take.

That, thereupon, Petitioner's Counsel prepared a stipulation to that effect and requested the prompt signing and return thereof; that compliance was not had with this request, and that shortly thereafter, the office, library and papers of said Counsel were destroyed by fire which was assumed to be a sufficient reason for delay in complying with the request to sign the said stipulation.

Further, that on or about the 25th. of March 1908, Counsel for petitioner sent an additional stipulation to Counsel for Respondent covering the agreement had and above set forth, requesting the signing and return of the same.

Counsel for Respondent, while promising to sign the said stipulation has, notwithstanding repeated requests, failed to do so, and without any just or reasonable cause, and that petitioner

is now constrained to proceed to take its testimony without regard to the proposed agreement and for that purpose it avers that it is entitled to enlarge the time for taking testimony and for the issuance and return of commissions herein. That the delay has, in no manner, been caused by its fault or that of its Counsel, but solely as above set out. All of which will fully appear by copies of the correspondence had in this connection by
116 the annexed affidavit.

Wherefore, petitioner prays that the time allowed these parties for the taking of testimony and for the issuance and return of commissions be enlarged for three months from this date, and for all general relief.

(Signed) HALL & MONROE
Solr.

Harry H. Hall, being sworn, says that he is one of the solicitors of the complainant, that he has always been prepared to have this case pushed to a speedy trial, and termination, and that he has been prevented solely by the failure of the soiicitor for respondent to carry out the understanding that this case should be submitted on affidavits and such other testimony and evidence as defendant might see fit to offer.

And affiant states that in his opinion, the only manner in which this cause can be brought to trial is by abandoning all attempt to agree upon the manner of presenting the issues and by regularly proceeding to take testimony under commission and before the master.

(Signed) HARRY H. HALL

Sworn to and subscribed to before me, this 2nd day of June 1908.

(Signed) E. M. FULLER
Deputy Clerk U. S. Circuit Court

Order.

The foregoing petition, prayer and affidavit considered, let the time of the taking of testimony herein and for the issuance and return of commissions be enlarged and extended for ninety days from this date.

June 2, 1908.

(Signed) EUGENE D. SAUNDERS
Judge.

117 Order to Place on the Chancery Order Book.

Extract from the Chancery Order Book.

Tuesday, January 4th, 1910.

Southern Railway Company

vs. No. 13300

Ephraim Simon.

The court has this day ordered the following Motion and Consent, presented and filed this day to remain on the Order Book for ten (10) days, to-wit:

"On motion of Hall & Monroe, Solicitors for Complainant and on suggesting the annexed consent of the Solicitors for the Defendant, it is ordered that a fee of Five Hundred Dollars, ($500.00) be taxed as costs as the compensation of the Honorable Charles F. Buck, Master for his services herein.

HALL & MONROE,
Sols. of Complt.

We hereby consent to the fixing of the compensation of the Master at Five Hundred Dollars as above stated.

HENRY L. LAZARUS,
Sol. for Deft."

118 Number 13,300

United States Circuit Court, Fifth Circuit and Eastern District of Louisiana.

Southern Railway

vs.

Ephraim Simon

Master's Report.

Filed January 6, 1910.

119 No. 13,300

United States Circuit Court, Eastern District of Louisiana.

Southern Railway Company

vs.

Ephraim Simon

Report of the Master.

I was appointed "Special Master" in the above entitled cause as per the following order entered by Honorable Charles Parlange, Judge, June 10th, 1905:

"The Court hereby appoints Honorable Charles F. Buck to be Special Master in Chancery in this cause with all the powers possessed by Masters in Chancery.

"This cause is now referred to him and he is specially authorized and directed to hear and take all testimony and evidence in this cause and to report the same to this Court, together with his findings of law and fact on any and all matters which may come before him in this cause."

The parties appeared, evidence was adduced and argument had and the Master now respectfully submits his report on all matters of fact and law, according to his understanding of the order of reference, as follows:

120 The issues in this case can be briefly stated as follows:

Ephraim Simon, defendant in this cause, claiming to have received injury, in a collision while on a train of the complainant company, the Southern Railway Company, alleged to have been caused by the negligence and fault of the said company, on the eighth day of February, 1904, filed suit on Dec. 1st 1904, for damages, alleged to have resulted therefrom to him, in the Civil District Court for the Parish of Orleans, No. 74869 of the docket thereof suit falling to Division "D" of said Court, presided over by the Honorable W. B. Sommeville, Judge.

The damages are specified as follows:

Physical and mental anguish $5000.00; for loss of profit to his business $4000.00; deterioration of stock $3000.00; for extra costs of manufacturing stock $1000.00; for nurses and medicines, etc. $250.00; for physicians' services $98.00,—total $13,348.00.

The Southern Railway Company, defendant in that suit, is described in plaintiff's petition as a corporation organized under the laws of the state of Virginia and doing business in the City of New Orleans." The petition contains no other allegation as to the residence or domicile of the corporation defendant, in the body thereof, but it concludes with the following prayer:

"Wherefore, the premises considered, your petitioner prays that the Southern Railway Company, defendant herein, be cited to appear and answer thereto and that, it having failed to comply with the provisions of Section 1 of Act 54 of the Session of 1904, the service of process in the suit be made upon Honorable John T. Michel, Secretary of State, said service, so made, to be a service binding upon the said Southern Railway Company, as provided for in the act aforesaid," etc.

Then follows the prayer for judgment, after the usual delays and proceedings.

121 Regular citation issued in due form, the return upon which by the Sheriff is as follows:—

"Received a certified copy of the within citation and petition, on the third day of December 1904 and on the third day of December 1904, I served said copies on the within named Southern Railway Company in the Parish of East Baton Rouge, State of Louisiana by personal service on Eugene J. McGivney, Asst. Sec'y of State, John T. Michel, Secretary of State, being absent at the time of service."

(Signed) W. J. MILLIGEN,
Deputy.

The defendant made no appearance. A judgment by default according to the provisions of the Code of Practice of this State was entered on January 10, 1905. On the 16th of January 1905 the matter was called up on motion to confirm the default.

A jury was empaneled, a number of witnesses examined and the judgment rendered for the full amount as prayed. The evidence was not reduced to writing.

The Southern Railway Company, advised of this judgment, filed its bill of complaint in this Honorable Court on February 6, 1905,—the nature and object of which may be best and briefly stated in the words of the prayer for relief, to-wit:—"that the said Ephraim Simon, who is plaintiff, as aforesaid in said action at law, entitled Ephraim Simon vs. The Southern Railway Co. No. 74,869 Civil District Court for the Parish of Orleans, his counselors, attorneys, solicitors, or agents may be restrained by an injunction issuing out of this Court from further proceeding against your orator, under the said suit and judgment or form [from] issuing execution thereon, or attempting thereunder to seize any property movable or immovable of your orator, or in any manner attempting to enforce the same."—

It is manifest at a glance, that in order to obtain this relief the judgment from execution on which the defendant is to be perpetually restrained and enjoined must be either an absolute nullity, as matter of law, or to be so tainted with fraud and "ill practices" as to justify the intervention of a Court of Equity to restrain its enforcement.

The cause of action stated in the Bill presents these issues,—these two distinct propositions.—

122 Stated in direct form—freed of superfluous verbiage usual in such pleadings, it is alleged (see paragraphs 5-6-7 of the Bill—how service of citations was made or attempted to be made, through the Secretary of State "by virtue of act No. 54 of 1904," that such a citation "was not a citation upon your orator, and is absolutely null and void for the purpose of bringing it (the complainant Company) under the jurisdiction of the said Civil District Court."

The averment of nullity of this citation is deduced from the specific averment that the Complainant "is not a foreign corporation doing business in the State of Louisiana and that none of its lines of Railway enter or traverse any part of the said State." (Paragraph 6)

It is not at this time necessary to notice the question raised in said Paragraph 6, as to the alleged violation of the Federal Constitution, because the plea involves the assumption that it

may be attempted to hold the defendant to the citation "when not transacting business in the State."

If it should be found as matter of fact, that the complainant was not doing business in the State in the sense of said act when the "Substituted" citation, through the Secretary of State was attempted,—the absolute nullity of the judgment complained of must follow and there would be no other question left in the case.

11.

It is averred that the defendant Ephraim Simon, in obtaining his said judgment, "was guilty of subterfuge and fraud, etc. that same, "and the verdict of the jury was unconscionable as having been rendered fraudulently and upon false testimony, etc."—x x "and that it would be against good conscience to allow same" to be used to extort money that is not owing from your orator, which has no remedy at law in the premises and which has a complete and meritorious defense to the claim on which said judgment is based." (Paragraph 8 and 10 of the Bill of Complaint)

Certain specifications under these charges will be referred to when the question is considered, under the evidence.

123 Complainant avers that the Secretary of State did not communicate the fact of the citation; that it had no notice or knowledge of the pendency of the suit "until after the rendition of said judgment."

The defendant reserving always certain questions under special pleas and demurrer, which it may be necessary to refer to or consider hereafter, answers at length, denying the substantive facts set forth in the bill of complaint—and setting up certain technical defenses.

It is admitted that complainant is a "foreign corporation", that "service" upon it was made under Act 54 of 1904 on "the Secretary of State of Louisiana, in the absence of "an agent designated by the Southern Railway Company, upon whom process should be served; it is averred that the said Southern Railway Company doing business in this State is subject to the jurisdiction of the State Courts through process served" as stated.

It is claimed the judgment of the State Court is conclusive—practically res judicata as to the fact alleged that the Southern Railway Co. was doing business in this State.

The charge of "fraud" in obtaining the judgment and all the elements and specifications, made thereunder, are denied as malicious and false; the proceedings, under which the original judgment for damages in the amount claimed $13,348.00 was rendered are asserted to be regular; the judgment rendered on evidence adduced to jury in open Court; the verdict confirmed by the presiding judge;—and that the Companilant [Complainant] company should obtain no "review" of said judgment in this—another Court,—but should have made its complaints by appeal or otherwise, in the Court which rendered the judgment.

Such stated as briefly as a correct and full appreciation of the pleadings seems to permit are the issue made in this cause.—

Before stating the findings of fact and law, in accordance with order appointing the Master, it is deemed proper to mark the starting point at which under said order, the master's investigation commences:—or in other words, the condition of the Record on the 10th day of June 1905—the date of the order,

124 appointing the master, and on the 16th day of July 1908, the first date on which the parties appeared before the Master for the purpose of advancing the trial of the cause.

The bill was filed on Feby. 6, 1905, and the defendant was ordered to show cause why a preliminary injunction should not issue,—a restraining order being granted:

The rule was tried, on affidavits and on the 9th of June 1905, the preliminary injunction issued, the Court assigning reasons in writing which are on file. From these and from the objections urged by solicitor for defendant, it appears that the main contention was that the Court is precluded from issuing an injunction in the cause, because of the prohibition of Sec. 720 Revised Statute. Printed Record on file, page 67.

In the meantime, a general demurrer had been filed February 25, 1905, stating two points, viz.,

First:—That the bill disclosed no matter of equity on which complainant could have a decree for relief; and second, that this Court is without jurisdiction to hear and determine this cause, inasmuch as the complainant seeks through the process of

this Court to review a judgment of the State Court, and to control by its process the proceedings of said state court with reference to final judgment rendered there."

This ground for demurrer is thus stated as pleaded, because solicitor for defendant contends that the question is not disposed of by the decisions on the interlocutory matters and is still open as a defense in this case.

On the 9th of June, the Circuit Court, Hon. Charles Parlange, Judge, granted the preliminary injunction assigning written reasons on file, of same date.

On the 15th of December 1906, an order or judgment was entered overruling defendant's demurrer.

On February 5, 1907, defendant filed a plea,—which in substance is a reiteration of the demurrer to the jurisdiction of the Circuit Court. It assumes that the state court had acquired jurisdiction over complainant and it should follow that the judgment rendered could not be revised, reviewed or
125 set aside, on the allegations made in the Bill of Complaint.

On the 27th of May 1907, Hon. Eugene D. Saunders, Judge, hearing on this plea was had and same was overruled and defendant allowed until the 1st Monday in August "to further plead or answer."

On the 5th of August 1907, defendant filed his answer the substance of which has been stated above.

On or about the 15th of Nov. 1907, the complainant filed a motion in open Court to the effect that the defendant, Ephraim Simon, stand committed for contempt of Court and that he be punished by fine and imprisonment for deliberately and intentionally violating the injunction."—which had issued.

As ground for this motion the Court was informed that the defendant had "deliberately and intentionally violated said writ of injunction" by causing execution to issue on his judgment in the Civil Dist. Court.

On Nov. 15, 1907 defendant filed his return to this rule for contempt. It is a reiteration of the plea to the jurisdiction of this Court amplified coupled with specific averments that the State Court had acquired jurisdiction ratione materae [materiæ] et personæ; that its judgment rendered in a cause of which it so had jurisdiction was valid and conclusive and this Court is

without power to affect the rights of defendant in and to said judgment, and is "without power to award the writ of injunction" to enjoin its execution etc.

On the 15th of November, the rule for contempt as tried "and made absolute"—written reasons for judgment are on file—Eugene D. Saunders Judge—showing again,—the facts being admitted" that the issue turned on the question whether the Circuit Court had jurisdiction for the purposes stated in the Bill and again the point is decided against the defendant, and the jurisdiction maintained.

This was followed by an application for writs of habeas corpus and certiorari to the Supreme Court of the United States.

126 The application was allowed to be filed, the usual preliminary orders were issued, the record was ordered to be sent up and in due course the Supreme Court denied the relief prayed.

It may, for the purposes and extent of the Master's duty, and power, in the premises, be conceded that this decision of the Supreme Court is not conclusive:—that it does not definitely determine the issue of jurisdiction; that in fact it seems only to hold that prima facie, on the face of the papers a sufficient cause of action, within the cognizance of the Circuit Court is stated or shown, that it, the Supreme Court declined to decide the important issue in such collateral proceeding; the injunction had issued on an apparent sufficient showing, which it is incumbent on the defendant to respect and obey.

I believe, this, briefly stated, a correct interpretation of the decision of the Supreme Court. It leaves the case precisely as the record shows it, on the judgment of the trial judge, maintaining the jurisdiction of the Circuit Court.—

At this stage, the contest on the face of the papers had reached its termination, the case was taken up before the Master on the issues made in Bill of complaint and the answer.

Proceedings before the Master.

The case was fixed for hearing by consent on Thursday, July 16, 1908, before the Master.

Harry H. Hall, Esq., for complainant

Henry L. Lazarus, Esq., for defendant.

Dr. Denegre Martin and Harry H. Hall, Esq., testified on behalf of complainant.

Solicitor for complainant offered ceratin documentary evidence—duly identified and further hearing was adjourned subject to notification of the Master or agreement of the parties,—all as per Exhibit marked "Testimony taken before the Master on behalf of complainant. Filed Saturday April 16, 1909, Signed Charles F. Buck, Special Master, returned with this report.

127 Hearing was resumed January 7, 1909. The testimony of Lars A. Jones was taken on behalf of defendant. Both parties present by their solicitors. Documentary evidence offered, duly identified and filed as per Exhibit marked "Testimony for defendant filed April 16, 1909.

Finding of facts.

From admissions in the pleadings and evidence adduced, I find the following facts:——

1st. Complainant is and was at all times, for the pusposes [purposes] of this suit and all matters involved therein, a citizen of the State of Virginia and the defendant a citizen of the State of Louisiana.

2nd. The defendant, Ephraim Simon, was on or about the 8th day of February 1904 a passenger on a train of complainant Company, on a first-class passenger ticket, for which he had paid the regular rate, for a sum from Selma, Ala. to Meridian, Miss.

3rd. That a collision occurred and said Ephraim Simon sustained some injury.

4th. The question of liability of the Railway Company for damages, for such injury vel non is not put at issue—and seems to be admitted.

5th. Certain amicable verbal negotiations occurred between representatives of complainant Co. and the defendant, Ephraim Simon, by his counsel, Judge Hy. L. Lazarus, without result.

6th. The latest events, in this regard, transpired on April 4, 1904.

These general facts apply to both issues, as set forth in the statement of the case.

I will now endeavor ot [to] state the facts as I find them or understand them, on which the controlling conclusion must be found, on the question whether the Southern Railway Co. complainant was "doing business" in the sense of the statute on the 3rd day of December 1904, in the State of Louisiana,—so that, as claimed by defendant, she could lawfully be
128 cited and brought under the jurisdiction of the Civil District Court by service on the Secretary of State.

On this special issue, I find the facts to be:

1st. The Southern Railway Company, complainant, did not on the 3rd of December 1904, nor at any time since or before own tracks and operate any taims [trains] for freight or passenger, tran-portation, in regular course of railway traffic anywhere within the borders of the State of Louisiana.

2nd. That tickets are sold by a ticket agent "J. C. Andrews" over the complainant's roads, none of which reaching any point nearer to the City of New Orleans than Atlanta, Ga. That all his, the ticket-agent's correspondence and communications, concerning the sale of tickets, is with the Louisville and Nashville R. R. Co., which furnishes said tickets.

3rd. The tickets are sold from an office occupied by said J. C. Andrews at No. 704 Common St. (St. Charles Hotel) leased by the Southern Railway Company, and conspicuously advertised S. R. Southern Railway. Passenger and Ticket Office. Pullman Reservation." See Exhibit.

4th. Said "ticket-agent" J. C. Andrews has no connection with said Southern Railway, except as incidentally result from the sale of tickets, and all persons travelling on transportation sold by him, over the lines of the Southern Railway Company, outside of and beyond the State of Louisiana" are conveyed on trains of the Louisville and Nashville Railroad Company and no other, throughout the State.

5th. The Southern Railway Company has also had and still has an office under lease executed through one of its Vice-Presidents in the building known as the "Morris Building" in this City.

The record does not seem to disclose what business, if any, was transacted in this office.

6th. On the 16th of March 1905, the defendant, Ephraim Simon, engaged passage to Washington, D. C. and paid the price of the ticket, for the entire distance, $34.00 by check to the order of the Southern Railway Co. collected on the
129 endorsement "Southern Railway, J. C. Andrews, S. W. Agent.

7th. The Southern Railway Company is owner of certain shares of the capital stock of the New Orleans Terminal Company.

8th. The said "Terminal Company" owns and operates railway tracks and extensive terminal facilities within and in the neighborhood of the City of New Orleans, Parish of Orleans, State of Louisiana.

9th. All of the stock of this company is owned by the Southern Railway Company and the St. Louis and St. Francisco Railroad.

10th. The said Terminal Company is a distinct corporation and its affairs are managed by its own officers.

11th. The interest (or stock) of the Southern Railway Company are represented by one or more members on its Board, residents of the City of New Orleans.

12th. The Southern Railway Company has never operated any trains over the lines or poroperty [property] of the Terminal Company.

13th. These properties tracks, appurtenances and terminal facilities at Chalmette were constructed with moneys procured by a bond issue of Dollars, which are endorsed, or payment guaranteed by the Southern Railway Company and the St. Louis and San Francisco Railroad Company.

14th. On the 1st of July 1903 a written contract of lease was entered into between the "Terminal Company" as lessor and the St. Louis and San Francisco Railroad Company and the Southern Railway Co. as lessees,—a printed copy of which marked "Exhibit B" offered by both parties to this suit is annexed and made part of this statement.

15th. An amendment or modification of this contract was entered into between the parties on January 2, 1908 annexed and filed as Exh. B-2, which however the master intends to ignore as irrelevant and immaterial in substance and because made many years after the conditions, as they must be found to exist on the date of service of process in the original suit on the 6th of February, 1905.

130 16th. This lease in short, confers on the lessees, each one separately, the privilege of "using for the purposes of its traffic, all roads, stations, terminal facilities, etc. etc. also "all improvements or enlargement thereto, other lines, additions, etc., that may be thereafter constructed "only (Quoting) to the extent, however, that may be necessary and sufficient to enable each lessee to use and enjoy for the purposes of its business, the rights and privileges hereby granted, demised and leased." And "provided (quoting) always and it is hereby expressly agreed that the rights and privileges of using the railroad, stations, and other property of the Terminal Company hereby granted to each lessee shall be exercised in common with the Terminal Company and with the other lessees and with such other company or companies as may hereafter from time to time, obtain from the terminal company a grant or lease of similar, or other rights, privileges and uses thereof."

17 The Terminal Company retains full power and control to use and operate these properties "on its own behalf" to grant to other company's [companies] rights "similar in part or in whole" etc. "but not, however, in any manner to impair the rights and privileges hereby granted to the lessees respectively:—

18 This lease is made for Ninety-nine years. The lessees agree to pay an annual rental of $5.00 each and "semi-annually on the 15th of June and on the 15th of December in each year each one will "without any previous demand therefor" (pay)

a sum equal to one-half of the semi-annual interest on all outstanding bonds from time to time issued, etc. xxxxxxx

19 The Southern Railway Co. has never had any cars operated on the tracks of the Terminal Co: Jones page 7.

20. It is apparent from the contract of lease that the tracks and terminal facilities owned by the Terminal Company form no part of any particular line or lines of Railway, but are manifestly used and intended to be used by any or all Railway Companies entering this City, for switching and terminal purposes.

21 The Southern Railway Company and its co-lessee have a pecuniary interest in these facilities being used by
131 other Companies because the earnings, if any, over and above the operating expenses inure to the benefit of the said two lessees by being applied pro tanto to the payment of interest on the outstanding bonds and the redemption of such bonds.

It is admitted that the S. R. Co. had not complied with Sec. 1 of the Act No. 54 of the General Assembly of Louisiana, requiring foreign corporations doing any business in this State to file a declaration in the office of the Secretary of State, giving the place of its business and the name or names of its agent or agents.

And the issue therefore presented and to be decided under this State of facts, is whether the Southern Railway Co. was on the 3rd day of December 1904 (when citation was served on the Secretary of State) "doing any business of any nature whatever in this State" according to which it could lawfully be served with process in the (v a) Parish, where it may do business, all according to the provisions of Sec. 11 of said Act.

23.—Certain receipts purporting to be receipts for freight delivered for shipment to various points in the State of Alabama—are in evidence but no definite fact can be concluded from them. They seem to be merely dray-receipts.

It also appears that entire freight cars arrive in this City attached to the trains brought in over the L & N Road. These cars carry through freight from place of shipments and are attached at points of distribution of freight trains to the trains of the L & N R R and brought in by it over its tracks.

Statement of Facts on the Charge

That the original judgment was obtained by "Subterfuge, fraud and false testimony."

1st. Interviews for amicable settlement terminated on April 4, 1904.

2nd. The suit in the Civil District Court was filed on December 1, 1904.

No further notice or demand had been given or made.

3rd. The citation was served on E. J. McGivney, Asst. Sec'y of State, John T. Michel, Sec'y of State, being absent at the time of service on December 3, 1904.

4th.—It does not appear that the Secretary of State, or his Assistant issued any notice or took any steps to notify the Southern Railway Company of the fact.

5th.—On January 10, 1905, judgment by default was entered.

6th.—On the 16th of January, a jury was empaneled to try the case on confirmation of default entered January 10, 1904.

Plaintiff represented by H. L. Lazarus, H. Renshaw and H. Michel. Defendant absent and not represented.

132 7th. The plaintiff and five others were examined as witnesses—the court charged the jury and in due course, a verdict was brought in for the full amount claimed, as itemized above and formal judgment rendered thereon.

8th. The testimony was not reduced to writing.

9th. On the day after this judgment was entered, Harry H. Hall, Esq., an attorney practicing extensively, took notice of it on the day after its rendition and before it became final in the Court, which rendered it; this was done however, unofficially by reason of personal relations between him and officers of the Southern Railway Co. He was not representing, nor authorized to represent the defendant.

He communicated the situation to the general counsel of the Company in Washington and this suit in equity seems to be the

result,—reasons being given why adequate remedy or relief could not be had by entering the proceedings in the State Court at that stage of the proceedings.

Here the domain of positive fact ends and the field of conflicting testimony is entered. The charges of fraud, ill practice and false swearing rest upon inferences and are deductions from the nature of the claim; the manner of its prosecution into judgment, and other incidents standing out in the development of the case.

The inferences and conclusions to which they had involve an analysis in which facts and theory are so interwoven, that I can not undertake to state any conclusion of fact or law, except in an argumentative form, deducing such legal result as an analysis of conflicting testimony may lead to.

CONCLUSIONS AND REASONS.

I.

Did the Civil Dist. Court acquire jurisdiction?

133 From these facts and the face of Record, showing service of citation on McGivney, Assistant Secretary of State, we must determine whether the State Court acquired jurisdiction in personam over the complainant corporation, the Southern Railway Company.

The question divides itself into two parts, viz:—

1st. Is the service on the Assistant Secretary of State a service on the Secretary of State, in the sense of the Statute, producing the effect intended as if service had been made on the Secretary of State.

2nd. Was the complainant Company doing business "or any business" or such business on "December 3, 1904, in the Parish of Orleans, State of Louisiana, that it could be brought into Court by such service on the Secretary of State and a judgment in personam rendered against it.

First.

Is it judicially speaking right to assume the process served on the Assistant Secretary of State, is process served on the Secretary of State?

I have been unable to find guidance or authority on the point.

Sec. 2 of the act of 1904 (Act 54 page 134) provides in this regard X X "And service of process in such suit may be made upon the Secretary of State the same and with the same validity, as if such corporation had been personally served."

The statute imposes no duty on the Secretary and to say that a manifest duty suggests itself, would be to legislate something into it, which is not there. The statute makes possible a violation of a fundamental principle briefly and beautifully stated by Mr. Justice Field in St. Clair vs. Cox 105, U. S. 356, a case involving similar issues. Speaking of the right of the State to provide by special legislation the conditions, in which "foreign Corporations" may be served with process he says:—

"Such condition must not however, encroach upon that principle of natural justice which requires notice of a
134 suit to a party before he can be bound by it."

A statute which provides a substituted service of process through a public officer, without imposing any duty in regard to it, comes perilously near to an encroachment of that principle:—the statute and action under it must at least run the gauntlet of stict construction.

Who or what is the Assistant Secretary of State? He is not elected by the people nor appointed by the Governor. He is an aid to the Secretary of State, who has authority or option "to appoint an assistant who shall be known as Assistant Secretary of State" (Here there is a break in the Art. of the Constitution) (Art. 79) it proceeds "*Sic*" or in case of his disability to act or under the directions of the Secretary of State shall have authority to perform all the acts and duties of the office of Secretary of State."

This from Art. 79 of the Constituion of 1898. In 1904 the statute in question is enacted and it requires service on the "Secretary of State": not in the office of the Secretary nor on the Assistant, if he should have one nor on any representative.

The service does not show even that it was made at the office of the Secretary: it was made (quoting) "on the within named Southern Railway Company, in the Parish of East Baton Rouge, State of Louisiana, by personal service on E. J. McGivney, Asst. Sec'y of State, John T. Michel, Secretary of State being absent at the time of service."

This "Assistant" is appointed at the option of the Secretary and may be removed at pleasure.

He is nowhere designated as an officer of the State and there is no provision requiring him to take an oath. His salary is payable out of an appropriation of twenty-five hundred dollars authorized for "clerical expenses" of the Secretary of State.

Manifestly under the terms of the Articles of the Constitution, he is a mere clerical Assistant to the Secretary with authority to perform such official acts as the Secretary
135 deems proper to "direct" him to perform and to act for him because of "disability."

There is no proof that the Secretary of State delegated the important duty of receiving "process" to bring foreign corporations into Court, to his Assistant.— Clearly there can be no legal presumption that he had done so.

Mere "absence" of the Secretary "at the time" does not vest authority in a clerk of the office.

If the Secretary's absence were permanent, the Governor would appoint the successor:—the assistant Secretary (?) has no existence as a State Officer and can only do things the Secretary requires or "directs" him to do. He is in no sense his official representative, except in case of the Secretary's disability."

To hold therefore that process served on such a person is service on the Secretary of State—would be to hold that it would be a good service to leave the papers (process) at the office of the Secretary of State, through any person connected with it convenient at the time.

Such a construction is at once repugnant to common sense and common justice.

True the law in terms imposes non [no] duty on the Secretary of State, in regard to the process served on him, and it might be argued, such being the case, that the result is in either event the same.

Secretary of State might say for argument sake he would have done no more and no less than he did do—nothing.

But that does not answer the point, the fact remains the statute requires service on him: it is a special statute intended to produce a special and extraordinary effect—and there can be no escape from the conclusion that to product the intended effect, it must be literally complied with.

The service must be on the Secretary of State, or there is no service.

Without therefore passing on the question whether a statute providing for substituted service, which requires no notice of any kind to the party to be affected, is constitutional
136 or due process of law,—I conclude that service of process in the case of Ephraim Simon vs. the Southern Railway Company on E. J. McGivney, Asst. Sec'y of State, is not the service required by Section 2 of Act No. 54 of the Acts of 1904, on which a personal judgment could be rendered and said judgment is therefore null for want of legal and valid citation.

That the rule of strict construction applies, see Otis vs. Boswell 9 How. 350; Harris vs. Hardeman, 14 How. 345, Galpin vs. page 18 Wall 369.

Since writing the foregoing, I am referred to Sect. 3523 of the R. S. defining the powers and duties of the Assistant Secretary of State.

Under this statute he is authorized to perform all, or any of the duties or official acts required by law of the Secretary of State, "during the sickness or absence for any cause" of the latter.

I do not think that part of the statute, obliging him to perform "such duties pertaining to the office as may be required of him by the Secretary" need be considered. It manifestly refers to the routine work of the office and is independent of that function which makes him the "official" in the case "of sickness or absence" of the Secretary.

This language is very broad: the effect to be given depends on the scope of the word "absence": if it means that the Assistant becomes vested with official function for the moment, when the Secretary may be out of the office—then all the above logic and conclusion fall to the ground: if it means absence absolute,

for the time being, so that in effect the Assistant becomes pro tempore Secretary of State—something more should appear than the declaration of the officer, making the service that the Secretary was absent "at the time".—

Sect. 3523 refers to an oath to be taken, as required by the constitution. The constitution of 98 contains no requirement in that regard. Besides where this Section and the Constitution of 1898 conflict the latter prevails.—

It is claimed that the point is not made in the pleadings by the complainant. The issue is as to the validity of a constructive citation; and it seems to me that matter appearing on the fact of the papers can and should be considered. —It is also claimed by Complainant that the Act (54) is unconstitutional.

137 However, the Master concedes that the terms of the statute raise a serious doubt as to the correctness of the conclusion stated, but haveing [having] dealt with the question, I let the matter stand as it is, for the Court to act on its own good judgment.

11.

On the second point I reach the conclusion that the complainant, the Southern Railway Company, was not doing business in the sense of the Statute under which it is attempted to be brought into Court by the "constructive" or "substituted" service through the Secretary of State.

True the wording of the statute is very broad: "whenever any such (foreign) corporation shall do any business of any nature whatever in this State" xxx "it may be sued" in any Parish of the State where it may do business" etc.

But "any business of any nature whatever" after all can only mean that it is doing business in the State as a corporation—perhaps as the corporation for which it is organized and exists.

It would lead to the rankest absurdities to take the words literally as meaning that any business transaction whatsoever would hold the corporation as "doing business" in the State. Suppose for instance, that the Southern Railway Company had so-called treasury stock for sale and sells some, even though a broker, on a public exchange:—would anyone contend that

such a transaction would be doing business in the State with the effect of subjecting the Company to the jurisdiction of the Courts by process served on the Secretary of State on any cause of action? Or suppose the Company places a bond issue on the market and someone buys some of these bonds, in New Orleans and pays for them here, would such result follow?

It may be borne in mind that a distinction runs through legislation and jurisprudence between the case, where the foreign corporation comes into Court as a plaintiff, having violated or being charged with violation of a statute—and where the statute is intended to bring the corporation in by constructive service of process, as a defendant.

138 See Cyc. of Law & Procedure Vol. XLX 1267-68

The facts relative to the office of Mr. J. C. Andrews, occupying an office in a prominent building in the centre of the City on the windows of which it is advertised in demonstrative and showy signs as the Ticket office of the Southern Railway Company and his business of selling passenger tickets, etc. would probably were the matter new cause me to hold that the Southern Railway Company was doing business in this State.

But the purposes and objects and the limit of Mr. Andrews' agency (?) is explained by the evidence bringing the case in that regard squarely within the scope of Green vs. Chicago & Burlington & Quincy Railway, 205 U. S. 530.

The syllabus of that case governs this in every detail; but there is a slight variance as to the manner in which the agent (?) did his business. In that case the agent or ticket seller did not furnish the tickets direct over the connecting routes to that of the defendant Co. He took the money; procured a ticket over roads West of Philadelphia and gave a "prepaid order" for a ticket to be given the traveller on arrival in Chicago.

In the case at bar, the L & N R R furnish the tickets over their line and connecting lines to Mr. Andrews and he sells them and receives the full price of the ticket. The effect—the actual transaction; is the same.

This same point is expressly held in Maxwell vs. Atchison R. Co. 34 Fed. 286 Cited in 205 U. S. above. It must be stated, however, that in this case the alleged agent had authority only to solicit business, not to sell tickets.

But in Earle vs. Chesapeake & O. Ry. Co. 127 Fed. 235 also cited in 205 U. S. the facts were stronger against the Company than in that case. See page 236. I am not unmindful of quite a current of authority which holds that under statutes providing against doing "any business a "single act of business" if it be in the exercise of the regular business of the corporation" falls within such statutes. But the decisions contrariwise predominate and I will not attempt to reconcile or
139 differentiate them. I base my conclusion on the dictum of Cyc of Law & Procedure 19 page 1268 No. 3

Solicitor for defendant invokes Farrior vs. New England Mortgage Ry. Co. (Ala.) 7 S. R. page 200 and State vs. Bristol Sav. Bank (Ala.) 18 SR. 533

The latter of these cases is hardly in point for any purpose. It was an action by the State for a penalty for doing business, and is decided on the statute which however is not quoted.

Besides in this as in the case of 7 S. R. the "business" was an act "full in the course of the corporation regular business as an investor of money." The court at page 200 No. 3 says:—

"The bill alleges that the complainant corporation" under its charter and laws of incorporation, had full power and authority" to loan money and take mortgage in controversy. In engaging in such a transaction, the complainant was in the exercise of its chief corporate function as imported by its very name and as admitted by the bill. The prohibition of the Constitution is against doing "any business in this State without compliance with the conditions specified. The doing of a single act of business, if it be in the exercise of a corporate function is as much prohibited as the doing of a hundred such acts."

It suffices to say that in both these cases,—without reference to the distinction where the corporation sues—and where it is sought to hold her on constructive service,—the acts of business done were "in the exercise of their chief corporate functions." It would be same as if the S. Railway Co. had constructed tracks and run a train over them.

This leads to the question partly covered by what is included in above—whether the interest of the Southern Railway Company as stockholder in the Terminal Company given in the statement

of facts—brings the Company within the Statute as doing business in this State.

140 It will be remembered that the Southern Railway Company is owner of one-half of the capital stock of the Terminal Company; that it is a lessee of the property of said Company with privilege to substitute some one else or enjoy the rights of lessee con-jointly with others; that it is an endorser on the bonds of the Terminal Co. and finally that profits if any are made over and above operating expenses inure to its benefit because they must be applied to the payment of interest and redemption of bonds on which the S. Railway Company is bound as an endorser.

The Company makes no use of its lease; it operates no trains over the tracks for either passenger or freight traffic. Some of its freight cars with through freight come in and are "belted" over these tracks in connection with trains operated by roads coming into the City.

Is this "doing business" in the sense of the statute? I think not.

This phase of the case in [is] partly covered by Earle vs. Chesapeake O. R. Co. 127 Fed. 235, but more especially by Peterson vs. Chicago Rock Island & Pac. Ry. 205 U. S. 390. Every line of that case is applicable to this and disposes of any contention that the ownership of stock in the terminal Co. is to be considered an act of business in the sense of the statute.

The holding of property in ownership or as lessee (especially when not used) is not doing business. Cyc of Law & Practice Vol. 19—1269.

Solicitor for defendant refers to Section 1 of act No. 74 of 1902. It suffices to say that that Section, and the entire act, contemplates leases and operating contracts between Railway Corporation [Corporations] operating lines of Railway; besides,—manifestly only the company actually operating the roads, whether as owner or lessee, would be doing business in this State.

The following additional authorities are submitted for reference.

That selling tickets is not "doing business." 8 Abbott P. R. N. Y. 427.

141 Owning stock in another Corporation:
Com. vs. Standard Oil 101 Pa. State 119.

Solicitor for complainant, in argument, suggests the question whether, assuming that otherwise the conditions existed, admitting of constructive service—and that complainant was doing business in Louisiana,—the jurisdiction of the Courts of this State under such exceptional conditions would not be limited to causes of action arising in this State? There is pertinent authority in that regard.

In the original petition plaintiff alleges the defendant to be a corporation organized in the State of Virginia. The cause of action arose in the State of Alabama, where the accident happened.

There is potent authority in support of this contention: having announced my conclusion on other points decisive of the issue I abstain from expressing an opinion but I incline to the conclusion that his action should have been brought either in Virginia or Alabama.

"The general rule, where it is not changed by Statute, is believed to be that Foreign Corporations are suable in the domestic tribunals upon any cause of action arising within the domestic jurisdiction, and this is so, although the Foreign Corporation may have been unlawfully transacting business within the State, since it can not set up its own wrong in order to defeat the action."

49 Neb. 537; 68 N. W. 929; 3 Duer N. Y. 648; 49 Federal 910.

"A foreign corporation cannot be sued in the domestic tribunals, even though it may be doing business and may have appointed an agent in the State to receive service of process, for torts committed in a Foreign State."

Central R'y Vs. Carr 76 Ala. 388; 52 Am. Rep. 339, Robins vs. Oceanic, 112 N. Y. 315; 19 N. E. 625; 16 N. Y. Civ. Pro. 255; 2 L. R. A. 636 Oleen vs. Buffalo, 130 Fed. 1017.

Thus it was held in 76 Alabama 388, that a passenger injured in his person while travelling in Georgia, on a railroad incorporated only in Georgia, although extended to and doing busi-

ness in Alabama cannot maintain an action therefor
142 in Alabama. "Newell vs. Great Western, 19 Mich. 336.

I am not fully convinced that these decisions rest on conclusive logic or are applicable here. The Statute (Act 54) gives to the intended service on the Secretary of State the effect of a "personal" service. So, the defendant is "found within the jurisdiction of the Court and I know of no exception to the rule that personal actions may be brought wherever the defendant is "found," if a non-resident, the Court having jurisdiction Ratione Materiæ.

It is contended by solicitor for defendant that the judgment of the State Court is res adjudicata on the question of defendant "doing business in the State" because the petition alleges the fact. But is not this a pure begging of the question: the allegation is not material to the cause of action: it is made to justify service of process on the Secretary of State. The plaintiff directs the "process" at his peril,—and the Court acts on the record thus made. There was no issue on the point: the plaintiff contents himself with service on the Secretary of State—if that service does not bring the real defendant into Court—how can the judgment be res adjudicata on any conceivable issue. As well might it be argued in any case that the judgment is res adjudicata on the question whether the Court had acquired jurisdiction. The statement of the proposition refutes itself.

From every viewpoint of this case, under the law and the facts, I conclude that the Civil District Court did not acquire jurisdiction over the corporation in question of the service of process, as shown by the record,—and said judgment should be decreed to be null and void.

Solicitor for defendant throughout this record, by pleading and objection to testimony has reserved the point that the Circuit Court has no jurisdiction in the premises.

As that question has twice been passed upon, by the presiding judge—I accept the record as I find it and do not deem necessary or proper to express a conclusion on that point.

11.

143 Should the execution of the judgment obtained by Ephraim Simon against the Southern Railway Company, in the Civil District Court, be enjoined as having been rendered on ill-practices, fraud and false swearing.

The evidence in the case does not justify such a conclusion. Both from the averments in the bill of complaint and the proof on testimony offered, these charges are mere inferences from certain facts in the case. There is no specific allegation of any particular act of "ill practice" or fraud or of false swearing. I will not undertake to fix a limit where proceedings of law and action in the Court of equity may end and begin, but there is authority for the assumption that even in court of equity, a judgment of another court will not be easily set aside and when fraud or ill-practices are charged, the fraud must be alleged specifically, as to how the litigants in interest or the Court were imposed upon to their injury and for the benefit of the perpetrator.

It is true there are incidents and facts connected with the obtaining of this judgment for so very large an amount, which may well justify serious suspicion,—that if a defense had been presented, no such judgment would or could perhaps have been rendered.

The main averments in the bill, on which the deductions of fraud and that false swearing must have been committed, are in substance,—first, that the actual injury to the plaintiff, Ephraim Simon, in said case, consisted of a slight sprain of his ankles without further injury, whereas Ephraim Simon alleges in his petition and it is assumed that he swore to it, that he sustained serious and permanent injury. That he originally made a demand for $5000. damages and would have accepted that in full satisfaction, but which was refused because it was considered "an exaggerated and untrue statement of his injury." That amicable negotiations for a time were had and suspended and the representatives of the Complainant Company were left under the impression that Ephraim Simon would modify his demand, or in any event give further notice before any
144 further steps would be taken. That having left the representatives of the complainant company, who were endeavoring to settle this matter, under the impression that they would receive further communication "he surreptitiously entered the suit falsely and fraudulently pretending that he had sustained damages in the amount of $13,348.00." That in the confirmation of a judgment by default and all the conditions of the case assuming that the defendant was in court, through the constructive service hereinbefore discussed, the said Ephraim Simon fraudulently caused the preliminary judgment by default to be

confirmed and the judgment rendered in the full amount claimed. That in obtaining this judgment, he was guilty of subterfuge and fraud in claiming such an amount and adducing testimony to sustain it, although he had made a claim of only $5000. originally, or had been apparently willing to accept such sum or one-half thereof. That the demand for that part of the claim of loss of profit, deterioation [deterioration] of stock, extra cost of manufacturing stock, etc. were and are fraudulently and fictitiously to the knowledge of Simon utterly untrue and even if true, would be such remote and consequential damages as could not be recovered.

The circumstances developed in the record that give color of justification for these suspicions is that a period of nearly 9 months elapsed from the last interview between the representatives of the Company and the Solicitor of Ephraim Simon.

Second. That it was to the knowledge of Simon and his solicitor that while it is not admitted that Mr. J. C. Andrews is an agent of the Southern Railway Company, through whom the company might have been brought in court, the fact is that it was known that he had participated in the efforts of an amicable settlement and his office, as is claimed, advertised as the office of the ticket agent of the Southern Railway Company.

Third. That on its face the amounts claimed are excessive and some of the items not recoverable in law, and probably could not have been recovered if a defense had been made. That the plaintiff in the original suit laid himself open
145 to suspicion by not causing [causing] the testimony to be reduced to writing. That in his petition he alleges that his physical injury to him or to his body was of permanent nature, which as a matter of fact I find to be open to great suspicion, if not distinctly negatived by the testimony of the physicians. His own attending physician, Dr. Gaudet, states that the injury sustained by Ephraim Simon "was serious and required a physician's skill and attention for upwards of two months." It is hardly to be supposed that the Doctor would not have been requested to state the fact that the injuries were permanent, if, in his opinion, he found them to be such:—in that respect, the testimony of Dr. Denegre Martin not only corroborates him, but confirms the views of the extent of the

injuries as not permanent in positive manner, and by proof of the fact that Ephraim Simon had full use of his limbs, when he saw him, a comparatively short time after the accident. But there is nothing to show that he swore falsely on this point or adduced false testimony in regard to it.

The proceedings, as per the record, assuming that the constructive service was in order, are regular and strictly according to the laws of practice governing Louisiana courts. There was no undue haste; more than the usual delays were permitted to intervene before the preliminary judgment by default was caused to be entered and before the confirmation of that judgment before the Judge;—that the testimony was not reduced to writing may permit criticisms and suspicion, especially when considered in reference to so large a claim, partly made up of items of doubtful right to recovery, but it does not in itself justify a conclusion of wrongdoing.

That the matter was submitted to a jury, rather than to the Judge, in my opinion, operates the other way. The responsibility of the Judge was in no manner reduced, or made less operative, while to it was added the judgment of 12 presumably impartial men. Persons incapacitated and absentees are sometimes said to be the special wards of the Courts and it must be presumed that the conscientious Judge, under
146 such circumstances, would have refused to enter the judgment and would have ordered a new trial if the circumstances of trial, offering of evidence and the evidence itself were of such nature, as to palpably suggest wrongful and fraudulent intent. For the purposes of this suit, as it would be for the effect on an appeal, the judgment is entitled to the presumption that it was rendered upon sufficient evidence.

It is true as a matter of fact that future profits are rarely recovered in damage cases, but it is not true theoretically, that they are not recoverable. It depends upon the nature of the case and whether or not they are susceptible of proof.

In support, generally, of these conclusions, that the averments and the proof are not sufficiently specific to justify an annulment of the judgment as fraudulently obtained, the following authorities are set:—

Kent vs. Lake Superior Ship Canal Co., 144th U. S. 75.
Travellers Association vs. Gilbert, 11th La. Fed. Rept.

Sixteenth American English Encyclopedia of Law, 2nd Edition 374.

Sutherland on damages—Third Edition, Section 1246.

It is contended by solicitor of complainant that the fact the defendant, in this case, offers no evidence to sustain the correctness of his charges of damages, but stands simply and purely upon a judgment, should be construed against him,—in fact, held conclusive of fraudulent intent and practices. I cannot adopt this conclusion. It was the right of the defendant to stand upon his judgment as rendered by the Civil District Court and I know of no law of pleading, which compells [compels] him to waive whatever rights he may have under that judgment.

The burden of alleging and proving fraud is on the complainant and no inference detrimental to the rights of the defendant can be made to his prejudice, because of his refusal to make an issue on the merits of the original cause of action, on which judgment is founded.

147 In Henricks vs. Mon 11th La. 139 it is said:

"The evidence must be clear and conclusive to annul a judgment for fraud and ill practice."

All of which is respectfully returned to the Clerk of the United States Circuit Court with record and all evidence taken before me and all documents and exhibits filed.

Report and Conclusions on the "Exceptions" Filed to the Above By the Parties, Nov. 15th, 1909.

First.—Complainant excepts to the Master's report "in so far as the Master finds and reports that the charges of fraud and bad faith averred and indicated by the evidence submitted are not sufficient to justify annulment of the judgment, etc." Nothing new, in evidence or argument has been tendered to induce the Master to change his conclusions in the regard and he adheres to his findings as expressed in the report.

II.

(a) The defendant excepts in extenso to all the adverse findings of fact and conclusions announced. Besides this,—solicitor for defendant quoting from the document "formally and ex-"pressly renews and urges here, the objection that it was beyond "the power or jurisdiction of the Court etc. * * *" (con-

densing) to confer the powers expressed in the order of reference and these should be "limited in accordance with the law; "that the master's functions under the law are limited to the "transmission to the Court of evidence, oral and documentary "and the proof administered in his presence, without comment "thereon or without announcement by the Master of his appreci- "ation either of the evidence or of the law that is to givern [gov- "ern] and control the disposition of issues formulated by the "pleadings" etc—

The Master feels constrined [constrained] to say that so far as the record informs him—either those portions of the proceedings which transpired in Court or those had before him, no such objection was ever made.

Whether any was made orally before the Judge, I do not know and the record is silent. The master is referred
148 to Kimberly vs. Arms 129 U. S. 512.

Suffice it to say, the Master suggests or recommends no ruling on the point. He governed himself by the terms of the order of reference, and reports accordingly. If the Court has conferred authority and powers beyond what the law permitted it to do—the Court is fully competent to correct its error.

(b) The defendant excepts to the form of the report, as not specifically referring to depositions and documentary proof, etc.

All the evidence taken and documents offered are duly filed over the signature of the Master and returned to the Clerk of this Honorable Court with the original record and this report.

III.

Exceptor complains that the Master "interjects questions of fact and law into the case" not raised by the pleadings." This exception covers two deductions: first whether service on the "Assistant Secretary" was compliance with the law requiring service on the Secretary of State; and second, would a valid service under the statute give jurisdiction for damages for tort or breach of contract happening outside the State of Louisiana.

It is true the first point is not raised in the pleadings and was not discussed in argument; but the fact of service on the Assistant Secretary of State appears in the Sheriff's return and

acting under the broad terms of the order of reference, the point occurring to the Master as inevitably involved in the question whether a service had been made with the effect of bringing the defendant into Court—he found and announced a conclusion on it.

The second point was raised in argument by solicitor for complainant.

The conclusion may seem to be not clearly expressed: the authorities cited appear to sustain the contention, but the Master's conclusion–now reiterated is that if there was a valid service of process under Act 54 (Acts of 1904)—it has the effect of a personal service, which would bring the defendant into Court if found within the territorial jurisdiction—the Court otherwise having jurisdiction ratione materiæ.

IV.

149 In all other respects the defendant's exceptions are a reiteration of the defenses urged and passed on and the Master is not persuaded to change his findings or conclusions and reports and refers the same with said exceptions finally to the Court.

The compensation of the Master, I am advised has been fixed by order of Court on consent of the parties, in an amount satisfactory to the [the] Master.

(Signed) CHARLES F. BUCK
Special Master.

150 Notice of Filing Master's Report.

Extract From the Chancery Order Book.

Thursday, January 6th, 1910.

Southern Railway Company

vs No. 13300

Ephraim Simon.

Notice is hereby given that Charles F. Buck, Special Master, has this day filed his Report herein.

151 Testimony of Dr. E. Dengre Martin & Harry H. Hall Esq. Witnesses for Complainant.

Filed before the Master April 16, 1909.

Filed in Court Jan 6, 1910.

U. S. Circuit Court. Eastern District of La.

No. 13300.

Southern Railway Co.

Vs.

Ephraim Simon.

In the above entitled cause, before me, Chas. F. Buck, Special Master, at 2 P. M. this Thursday, July 16th, 1908, appeared Harry H. Hall, Esq., solicitor for complainant in this cause, and Henry L. Lazarus, Esq., solicitor for defendant, for the purpose of taking testimony to be offered in behalf of complainant. The parties, as above stated, being present and the matter about to be taken up and testimony heard in behalf of complainant when Mr. Lazarus, solicitor for respondent, made objection to the taking of testimony on the following grounds, to-wit:

Henry L. Lazarus, Esq., solicitor for respondent, objects:

I object to the administration of any proof in this cause affecting or tending to effect [affect] the judgment of the Civil District Court of the Parish of Orleans in the cause of Ephraim Simon vs. the Southern Railway Co. and which record and cause is set out and annexed to and forms part of complainant's bill.

The objections are among others:

First—That it is not competent for the Circuit Court of the United States to undertake as a court of co-ordinate jurisdiction with the Civil District Court for the Parish of Orleans to review or revise a judgment of said Civil District Court wherein the said Civil District Court was seized of jurisdiction ratione materiæ and ratione personæ.

Second—That the Circuit Court of the United States is not vested with power or jurisdiction to revise or reverse a judgment of the State Court and particularly the judgment of the Civil District Court in this cause, the said Civil District Court being seized of jurisdiction of the controversy between Ephraim Simon and the Southern Railway Co. in which cause, after due proceedings had, a good and valid judgment was rendered.

Third—That the United States Circuit Court, as a
152 matter of comity as well as by virtue of a statutory prohibition, is restrained and prohibited from the assertion or exercise of power or jurisdiction over a judgment of a State Court and can neither, by virtue of said prohibitory statute or the law of comity between co-ordinate courts, restrain the parties litigant or the officers of the court in the assertion of rights in the State Court and the execution of the judgments rendered by said courts nor can it regulate the process issuing from said State Court.

Fourth—That the averments of complainant's bill are too general and indefinite to warrant the administration of evidence; that they are merely epithets and conclusions without a reference to any specific fact justifying or warranting the charge made and, lastly, the further objection to the introduction of all proof upon the grounds set out by respondent in his demurrer, plea and answer.

The solicitor of the complainant in reply to the objections states that these identical issues were raised in the demurrer of the defendant and in his plea and have been overruled by the judge of the U. S. Circuit Court. For the reasons stated by solicitor for complainant and for the reason that it seems to the master that the grounds for objections stated are substantially the entire defense of the merits of the bill and the master is unable to maintain the objections and thinks that the evidence ought to be taken and allows the complainant to offer his witness.

The master reserves the right to modify his ruling or change it on final hearing and investigation of the cause. To the master's ruling, in the event that he should adhere to it, a note is now made by exception with the right reserved upon hearing before the Court to move to suppress all evidence taken over the objections herein divorced.

DR. DENEGRE MARTIN, being first duly sworn on the Holy Bible by the master, was examined as a witness for complainant; examination-in-chief by Harry H. Hall, Esq.

Q. Doctor, you are by profession a surgeon and physician in the City of New Orleans.

153 A. Yes Sir.

Q. How many years have you praciced [practiced] that profession?

A. Seventeen years.

Q. On or about March, 1904, do you recall having made a visit to E. Simon, the defendant in this case?

A. Yes, sir.

Q. Did you at that time make any physical examination of him?

A. Yes, sir; I examined both feet and found a swelling of both ankles.

Q. What was the extent of that swelling?

A. The swelling was not very extensive, simply apparent and showed that the party had sustained some injury.

Q. Did he state to you how he had been injured?

A. His statement to me was that while in a train on the Southern Railway he was sitting on one of the seats with his feet on and against the back of the opposite seat when the car same [came] to a sudden stop and threw him with force forward, injuring his ankles.

Q. Did he state what kind of car he was in, whether a sleeping car or a day coach?

A. I don't recall that fact.

Q. It is averred in the original petition by Mr. Simon that the ligaments of his leg were lacerated and torn. Is that true or not?

A. That was not my finding.

Q. If that had been the fact, could you have found it?

A. Yes Sir.

Q. As a matter of fact, were the ligaments of his leg lacerated and torn?

A. They were not and could not have been from the nature of the accident.

Q. Did you make any subsequent examination after the 4th of March?

A. Yes, sir, I saw him subsequently; I don't remember the exact date. He was then in a fair condition and walking around the store; at that time the injury was not apparent, but
154 he stated that he still suffered from his injuries.

Q. How long was that after the first visit?

A. About two weeks, I think.

Q. Did you again see him later?

A. I don't recall any other visit.

Q. He has averred that his injuries were of a serious nature and sufficient to cripple him. What do you say as to the averment that his injuries were permanent?

A. That was not my opinion at the time nor did I think so from my examination.

Q. Where was Mr. Simon when you made the visit in March, 1904?

A. In his place of business on Chartres St. I don't remember the number, but it was opposite the new Court House.

Q. Was any one with you when you made the visit?

A. On my first visit I was accompanied by Mr. Kennedy, representing the Southern Railway.

Q. And on the second visit in March, 1904?

A. I was alone.

Q. Did you meet a Mr. Shumate, representing the Southern Railway Co.?

A. I remember going there with Mr. Kennedy; I went there with some one else, but I do not remember with whom. I remember going there once with Mr. Kennedy and on another time whether I went there with some one else or met him there I cannot recall positively.

Q. On both visits where was Mr. Simon?

A. In his place of business.

Q. What was he doing at the time of your visit?

A. On the occasion of the first visit, he was sitting in the store with his feet propped up on a chair?

Q. And on the second visit?

A. He was also seated in the store.

Q. Was he doing anything?

A. He walked to the door with me.

Q. What was being done in the store, if anything?

155 A. There were several wrapping bundles and attending to business; I don't know what they were doing, they did not seem to be very busy.

Q. Did you at any time in this connection, either with Mr. Kennedy or Mr. Shumate, see Judge Lazarus?

A. On my first visit to Mr. Simon, I called at the office of Judge Lazarus in company with Mr. Kennedy.

Q. Who was Mr. Kennedy?

A. Mr. Kennedy represented himself to be or rather told me that he was a representative of this Southern Railway Co.

Q. Now state what took place on that occasion.

A. I remember that the case was discussed and the possibility of a settlement suggested.

Q. What was said by either Mr. Kennedy or Judge Lazarus as to the amount of the settlement?

A. I do not recall exactly what was said in regard to the settlement, but my impression is that Judge Lazarus was willing to accept a settlement of Five Thousand Dollars.

Q. What did Mr. Kennedy say to that, if anything?

On the answer to this question and now moving to strike it out as it simply gives an impression and not the statement of a fact, Judge Lazarus asked the master to reserve his ruling at this time until the further examination of this witness.

By the master:

I think your witness can state his impressions as to the happening of a fact or event deduced from what he does positively remember; such statements are legal evidence, the effect to be given to them being matter for court or master to decide. In other respects, a final ruling is reserved as requested by solicitor for respondent.

Examination continued by Mr. Hall.

Q. Dr. Martin, on the 17th of March, 1905, you made this affidavit.

Counsel for respondent objected to the counsel for complainant reading to the witness his affidavit of the date

156 referred to or any part thereof until he shall have examined him with reference to the fact of an independent recollection of what he testified to on that date, but that the witness could refresh his memory by reading the affidavit and stating

whether he has an independent recollection of the contents thereof.

Dr. Martin was requested to read his affidavit made on the 17th of March, 1905.

By Mr. Hall:

Q. Now, Dr. Martin, having read that affidavit, which was made about twelve months after these incidents occurred, state whether your recollection is refreshed as to the statement that Mr. Lazarus made a proposition for a settlement of this claim.

A. It simply confirms the circumstances as I recall them at the time.

Q. Can you now state what Judge Lazarus said in connection with the settlement?

A. I am not prepared to say positively judt [just] what Judge Lazarus did say except that I recall the fact that a settlement of Five Thousand Dollars would be agreeable to him.

Cross examination by Judge Lazarus.

Q. Doctor what are your professional relations with the Southern Railway Co.?

A. No relations whatever.

Q. Were you specially retained in this matter of Simon against the Southern Railway Co.?

A. Yes Sir.

Q. And your visits to Mr. Simon were in the interest of your employment by the Southern Railway Co.?

A. Yes Sir.

Q. Do you know or have you any knowledge of when the accident of which Simon complained happened?

A. Not more than what was told me by Mr. Simon himself.

Q. When did he say the accident happened?

A. I don't recall the date.

Q. Do you know how long before your first visit
157 to him the accident of which he complained happened of your own knowledge?

A. No sir, I don't remember that.

Q. Do you know where the accident happened of your own knowledge?

A. I do not.

Q. Did Mr. Simon tell you all that happened?

A. He did.

Q. Did he tell you that he was carried on a stretcher from the train to a hospital?

A. He did.

Q. Did he tell you how long he was detained at the hospital and under treatment?

A. He told me the whole story, but I do not recall all the facts in the case.

Q. Was his daughter present when he told you the story?

A. That is my impression.

Q. Is there no impression upon your mind now of the facts as recited by him in connection with this accident?

A. I cannot testify as to dates or incidents; I recall only that part of the story which was the direct cause of the injury as this alone had bearing upon my testimony or the evidence which had to be given by me.

Q. When you saw him later in the month of March, you say that his feet were resting on a chair. Was that the first visit?

A. Yes sir; his feet were on a chair.

Q. Can you fix the date? Have you any independent recollection of the date?

A. None whatever.

Q. Have you an independent recollection of the year?

A. No sir.

Q. Now, doctor, had he any shoes on?

A. My recollection is he had on slippers.

Q. Were his legs bandaged?

A. They were not bandaged.

Q. Are you sure?

158 A. That is my recollection; he had no bandages to remove for my examination.

Q. Is that your present recollection?

A. That is my recollection.

Q. Could you be mistaken?

A. Certainly.

Q. You consulted the attending physician, Dr. Gaudet, before you were permitted to see him?

A. My recollection is that I consulted Dr. Gaudet on the same day that I saw Mr. Simon.

Q. And Dr. Gaudet consented to permit you to examine Mr. Simon?

A. He did.

Q. Mr. Simon was Dr. Gaudet's patient at the time?

A. Yes sir.

Q. Dr. Gaudet was in attendance upon him, was he not?

A. He so stated.

Q. Did Mr. Simon so inform you?

A. I don't recollect.

Q. Is Dr. Gaudet a physician of reputation and standing in this community?

A. Yes sir.

Q. He has been practicing just over thirty years, has he not?

A. I presume he has; I really don't know.

Q. Now you say you paid Simon a visit at some subsequent time and you saw him walking around the store.

A. Yes sir.

Q. Let me attract your memory to a fact and see if it will be refreshed. Was he walking at the time that you saw him at this later time on crutches?

Q. [A.] No sir; he had no crutches at that time; he may have had them in the store, he was standing alone.

Q. Do you know the year that was in?

A. It was a short time after my second visit to him in the interest of the railroad.

159 Q. Do you know whether Mr. Simon is to-day permanently cured of his injuries?

A. I do not.

Q. Do you know to-day whether he is not suffering from the injuries sustained in this accident for which indemnity was allowed him by the Civil District Court?

A. I do not know.

Q. Were the injuries that he sustained painful?

A. They must have been.

Q. You don't know what kind of business Mr. Simon was engaged in?

A. I do not. The store was just opposite to where the new court house now is, as stated in my direct evidence.

Q. Was there much of a stock of goods on hand?

A. I could not tell, the shelves seemed full.

Q. Have you had experience in appraising stocks of merchandise?

A. No sir.

Q. Did you know that Mr. Simon lives over his store?

A. That was my impression.

Q. Was not the fact communicated to you?

A. I don't recall that.

Q. How did you get that impression?

A. Because his family were all there and were about him whenever I called, giving me the impression that he lived at the store.

Q. Now you spoke of the visit that you made with Mr. Kennedy to the office of Mr. Lazarus with a view of effecting an adjustment of Simon's claim.

A. Yes sir.

Q. Did Mr. Lazarus inform you that the injuries were serious, that Simon had sustained a heavy loss, that he felt well disposed towards adjusting and that he would render a settlement to Mr. Simon, stating at the same time he did not know the measure of damages he sustained and fixed the amount at
160 Seventy-five Hundred Dollars. Was not that what Mr. Lazarus said?

A. My impression is that Mr. Lazarus did say that Simon had sustained a serious injury and a loss to his business, but I do not recall all of the conversation except that Mr. Kennedy and myself left with the impression that a settlement of Five Thousand Dollars would be agreeable and that it would be submitted to Mr. Simon.

Q. Now, doctor, do you recall Mr. Kennedy's urging Mr. Lazarus to submit an amount which he thought the matter could be adjusted for and that Mr. Lazarus said he would entertain the proposition of Mr. Kennedy?

A. I do.

Q. Do you remember Mr. Lazarus saying that he would recognize an adjustment on the basis of Seventy-five Hundred Dollars and that Mr. Kennedy made the proposition of Seven Hundred [and] Fifty Dollars when Mr. Lazarus said "there is no further use of discussing the matter, Gentlemen"?

A. There was a good deal said, but I cannot recall anything further than what I have stated before.

Q. From the statements as propounded by Mr. Lazarus in these interrogatories with reference to that interview, are you prepared to make or not a correct statement of the facts as they happened or what is your recollection of them?

Mr. Hall objected to the above question because many interrogatories were propounded to the witness which would necessarily call for different answers and that one general answer to all of them could not be correctly given.

Objection sustained.

Judge Lazarus Reserved a bill to the master's ruling on the ground that the witness had not made the objection or complained that he would be confused or embarrassed by the interrogatory.

Cross examination continued by Judge Lazarus.

Q. If it were stated in the interview at the office of Judge Lazarus between Mr. Lazarus, Mr. Kennedy and yourself, with a view to adjusting the differences between Simon and the railroad company, that on that occasion, after a protracted talk,
161 the proposition from Mr. Lazarus was to the effect that, notwithstanding the severe injuries sustained by Simon and the severe losses incurred in his business, he would, nevertheless, recommend to Mr. Simon an adjustment on the basis of evSenty-five Hundred Dollars, would that statement be correct or not?

A. My impression at the present time is that this question was discussed and several propositions and counter propositions made and that we were given to understand that a settlement of Five Thousand Dollars would be submitted to Mr. Simon.

Q. Whatever the figure was, it was to have been submitted to Mr. Simon, was it not?

A. Yes Sir.

Q. And Mr. Lazarus said he would do what he could to bring about an adjustment?

A. That is my recollection.

Q. Do you recall if it is a fact that a counter proposition was made by Mr. Kennedy to settle for Seven Hundred [and] Fifty Dollars, accompanied by the statement that that was a liberal allowance for the injuries sustained?

A. The exact amount I do not recall, but that Mr. Kennedy did make an offer of settlement for a very much smaller amount

I remember on account of the conversation which followed. My impression of these facts is given from a discussion of the case with Mr. Kennedy after leaving the office.

Q. Now, doctor, do you recall the fact that upon Mr. Kennedy's proposition and statement of the amount that he would be willing to pay whatever that amount was, but smaller than that suggested by Mr. Lazarus, that Mr. Lazarus said "gentlemen there is no use of discussing this matter any further?

A. I do.

Q. And while you and I shook hands, did not Kennedy leave the office abruptly?

A. I do not recall the circumstances.

Q. Do you recall the statement by him on the submission of his proposition that there was no use of further dis-

162 cussion in the matter.

A. I do recall the fact that Mr. Lazarus would not consider the proposition first made by Mr. Kennedy.

Q. Now sir, if Dr. Gaudet, who was an attendant upon Mr. Simon professionally with his professional standing, were to testify to any fact with reference to his treatment of the case, would you believe him or not?

A. I certainly would regard his opinion.

HARRY H. HALL, ESQ. attorney for complainant, tendered himself as a witness for complainant and, being first duly sworn by the master testifued [testified] as follows;

I am and for many years have been a member of the New Orleans Bar. On the 17th of January, 1905, I noticed in the Daily Court Report that a verdict of a jury, had been rendered against the defendant in the case of Ephraim Simon vs. the Southern Railway Co., No. 74869 of the Civil District Court, Division D, thereof, Judge Sommerville presiding. I went to court that morning for the purpose of verifying the report and examining the entry on the minutes which showed the redition [rendition] of the verdict in that case. Judge Sommerville was on the bench and called me to him and inquired if I represented as its counsel the Southern Railway Co., referring to the cause above stated. I told him that I was not the counsel and that the Southern Railway Co. had no legal representative and no agent in the City of New Orleans and was entirely unrepresented. The verdict complained of had been rendered the day before, but

no judgment had been signed and the matter was open and Judge Sommerville was, therefore, at that time and before the signing of the judgment advised of the fact that the Southern Railway Co. had no legal or other representative in the City of New Orleans. Thereupon and on that same day I wrote to Colonel W. A. Henderson in Washington, D. C., who is the assistant general counsel of the Southern Railway Co., informing him of this verdict. I took it upon myself to do this because of the fact that I was a director of the New Orleans Terminal Co., representing in the affairs of that company the
163 interests of the Southern Railway Co. and being on terms of rather intimate friendship with Mr. Samuel Spencer, the President of the Southern Railway Co. Colonel Henderson came to the City of New Orleans as soon as his business arrangements permitted him to do so and I then stated to him more distinctly the facts and conditions surrounding this verdict and the judgment which had subsequently been entered. The testimony had not been reduced to writing, there was, therefore, no evidence in the record which would justify defendant in taking an appeal. As I stated that the testimony of the witnesses had not been reduced to writing. I was thereupon requested by Colonel Henderson to file a bill in the U. S. Court to annul and set aside the verdict and judgment rendered in the Civil District Court for the reasons and upon the grounds set forth in the bill herein. My retention by Colonel Henderson for the purpose of drafting that bill and conducting these proceedings was my first professional connection with the Southern Railway Co. I state the president of the New Orleans & Northeastern Railroad Co., formerly Mr. Harvey and now Mr. Curren, and I were at the time and now are the directors of the Board of the Terminal Co. representing the interests of the Southern Railway as a stockholder of that company. The Southern Railway and the St. Louis & San Francisco Railroad now won [own] the stock of the Terminal Co., each railroad having equal representation on the Board of the Terminal Co.; that the Terminal Co. is an independent corporation *and* operates absolutely and in its own name and by its own officers the Chalmette Terminal and connecting Terminal lines in this City. The Southern Railway Co. does no business nor did it, at the time of these suits, do any business of any kind whatever in the State of Louisiana and the

City of New Orleans. It operated no trains into this City nor out of this City. The Frisco Co. for several years operated its trains over the Terminal lines, but has since ceased to do so. The Southern Railway never has operated its trains over the lines or property of the Terminal Co.

164 Cross examination by Judge Lazarus.

Q. Now what object had you in going to court and looking at a record of a cause with which you had no concern?

A. The simple interest resulting from my intimacy and plesant [pleasant] relations with certain officers of the Southern Railway Co., notably the president, Mr. Spencer, and the vice-president, Mr. Finley.

Q. Do you always examine the records of causes where your personal relations of friendship are involved and when you are not employed as counsel?

A. Whenever I knew, and I knew in this case, that they were entirely unrepresented in the City of New Orleans with no one to protect their interests, I would take it upon myself to attempt to protect them.

Q. Did you know they were not represented here or did you assume it?

A. I knew it.

Q. You believed you knew it?

A. I knew it.

Q. You are positive that you knew it?

A. Absolutely.

Q. You were a director of the Terminal Co.?

A. I was.

Q. And you were a director in 1903?

A. Yes.

Q. And you were a director in 1904?

A. And have been ever since.

Q. And you were a director representing the stockholding interests of the Southern Railway Co. in the Terminal Co.?

A. Yes.

Q. Did you not know as a director of the Terminal Co. that the Terminal Co. in its entirety with all of its lines and sidings and switches and depots were under a lease to the Southern

Railway Co. and the Frisco Co. and was being operated by them jointly as lessees of the Terminal Company's property
165 at a nominal rental of Five Dollars per year?

A. As a director of the Terminal Co. representing the interests as stockholder of the Southern Railway Co., I was aware of a lease to which you refer which is or will be in the record and which is not, as you state, a lease of $5.00, but is a lease for full and valuable consideration and the lease authorizes the lessees, the Frisco and Southern Railways to sublet to subtenants and the Southern Railway, exercising that privilege, has leased to the New Orleans & Northeastern Railroad Co. as its subtenant the right to use the Chalmette Terminals; but the Southern Railway has never used those terminals; has never operated a train or car along them and has never brought a train into the State of Louisiana.

Q. With reference to the lease itself as well as its contents, I want to ask you this question: The Southern Railway Co., acting jointly with the Frisco, are the lessees of the Terminal system, are they not?

A. Of the Terminal facilities.

Q. That it embraces railroad tracks through the City and outside of the City into the Parish of St. Bernard?

A. Undoubtedly.

Q. If the Southern Railway sublets, as you assert, it has the right under the lease to derive a revenue, does it not, from their sublessees?

A. No, it does not derive a revenue in the sense of a profit, but the acquisition of this very valuable and extensive property was made by the Frisco and the Southern Railway Co. with a view to anticipating the expected development of this port of New Orleans and the Southern Railway did not expect, nor dies [does] it now expect, to use those terminals until it can extent [extend] its line of railway into the City of New Orleans. The expense of fixed charges and the interest of money invested in this Terminal property and the cost of operation precludes any possible profit and these subtenants, or this subtenant, the New Orleans & Northeastern Railroad Co., contributes a pro-
166 portion of these charges and for that amount have the privilege of using the terminals and the Frisco does the same thing and any other railroad to which they have the

right to grant this privilege will pay therefor by such partial contribution.

Q. Is that not in the nature of a rent for the use of the property unconditionally and is not that rental based upon the trackage of the cars that travel over the terminals?

A. To answer two questions in one, the railroad company, the New Orleans & Northeastern, does not pay to the Southern Railway, but pays directly for the use of these tracks to the New Orleans Terminal Co. its proportion of the charges named. The Southern Railway Company, being authorized by its lease to name a subtenant for that use has named the New Orleans & Northeastern Railroad Co. which has no connection whatever with the Southern Railway, being an entirely distinct corporation.

Q. But is not the contribution by the New Orleans & Northeastern Road for the use of its tracts [tracks], terminals and facilities paid to the Southern Co proper.

A. No, it is paid direct to the Terminal Co. For instance, the Firsco [Frisco] and the Northeastern have the right, under this lease to use those terminals, and they likewise have the right to secure subtenants who may use them in their stead and place, and the Southern Railroad Co. has secured the New Orleans & Northeastern which pays its proportion of these charges for that use to the Terminal co. direct.

Q. And who is the beneficiary of these charges, the Terminal Co. or the lessees, the Frisco and Southern Railways, if there should be an excess over and above the fixed charges?

A. Primarily the Terminal Co. is the beneficiary. In a secondary manner, if by any inconceivable possibility the sums paid by these subtenants for the use of the terminals should exceed the amount of the fixed charges, the stockholders, namely, the Frisco and the Southern Railway Co., would be the ultimate beneficiaries.

Q. Would the Southern Railway Co., Mr. Hall, get the benefit of the excess by virtue of its general lease of the
167 Terminal property in propertion [proportion] to its one-half holding with the Frisco of all of the Terminal property?

A. Just as I told you, yes.

Q. We will try to distinguish, if we can, the different relations of the Southern Railway Co. to the Terminal. I am

trying to attract your mind first to their relations as a stockholder and then the Southern Railway's relations to the Terminal profits. As a lessee, does the lessee take the profit or does the Terminal Co. take it?

A. All the contracts are made upon the absolute assumption that there is not and never will be a profit. In other words, should the operation of the trains of different companies over the Terminal roads be increased so as to pay those charges then the charges would be cut down so as not to exceed them. It never was purchased as a pecuniary investment.

Q. That is true, Mr. Hall, as regards the Frisco and the Southern as holders and lessees, but I ask you, with reference to the matter, whether the profits arising out of the Terminal system, in consequence of the use of other roads of its rails, its terminals and its facilities, would not go to the lessees of the Terminal system in which they would share and share alike?

A. No such profits have ever been contemplated. Though the Terminal Co. has built a station on Canal St. which they have sublet to the use of the New Orleans & Great Northern Railroad Co., they are prepared to admit other companies, but always with the understanding that the charges would simply be prorated among the different companies so as to cover the cost and the actual expense of operation. They never expect and never will make a profit on the building; and the same applies to the other Terminal facilities.

Q. Where is that intention that you spoke of evidenced and embodied?

A. I can state, as one of the directors making those contracts and fixing those charges, that that is the entire scheme of operation.

168 Q. Where is the evidence of the contract beyond what is contained in your breast and in the breast of your associates?

A. In the rent to begin with and in the lease between the Terminal Co. and the Frisco and Southern.

Q. In the lease what expressed authority was given as in the contract with the New Orleans & Great Northern?

A. In other words, the terms or charges are fixed presumably upon the assumption of paying a pro rata of the amount

of the investment and the cost of operation and I may say that practically, as in all Terminal contracts of that kind, no one ever dreams of making a profit.

Q. What other roads operate over the Terminal System besides the New Orleans & Northeastern?

A. The N. O. & Great Northern. The Frisco about two years brought its trains into the city, but has ceased to do so.

Q. From what I presume the only trains now coming in over that road are the New Orleans & Northeastern and the New Orleans & Great Northern. Is the contract of lease between the New Orleans & Northeastern and the lessees of the Terminal in writing?

A. I think it is.

Q. Will you produce it certified as coming from the lessees of the Terminal?

A. I have no objection to making an application for it.

Q. Now, Mr. Hall, Colonel Andrews, whose office is under the St. Charles Hotel, holding himself out as the passenger agent of the Southern Railway, has been there in that vicinity for a number of years in the same capacity, has he not?

A. Undoubtedly holding himself out as such.

Q. Do you know in whose employ he is?

A. Not positively, but I assume that he is paid by the Southern Railway Co. to solicit passengers to travel over their lines where they come in connection with the Louisville & Nashville and the New Orleans & Northeastern outside of this state just as there are representatives of many other Northern roads in this city soliciting freight.

169 Q. All that you have said in your last answer is an assumption without knowledge. Is not that a fact?

A. I don't know what you mean by assumption, but I know that the Southern Railway has no road nearer to New Orleans than Mobile; that is positive knowledge. I know that the tickets over the Southern Railway are furnished to Mr. Andrews by the Louisville & Nashville road.

Q. How do you know it.

A. How do I know any particular that I have not seen with my eyes? I know it as a matter of railroad knowledge.

Q. Now, Mr. Hall, is the situation of the Southern Railway Co. with its agencies any different than what it was in 1903?

A. I think not.

Q. Do you know whether Andrews represents them here now?

A. I assume that he does.

Q. Are you the legal representative of the Southern Ry. Co. Here?

A. No, except in this case.

Q. Have they any representative here or in this state?

A. Do you mean a lawyer?

Q. Any agent or representative, a lawyer?

A. They have, since, in this state appointed E. H. Farrar as a person upon whom process should be served.

Q. Do you know when he was appointed?

A. Some time after this suit.

Q. Do you know how long after?

A. I do not know.

Q. They are doing no business here now?

A. None whatever.

Q. And the Southern Railway, has it done any business?

A. None whatever.

Q. And the conditions in August, 1905, you say were what they were in December, 1904?

A. As far as I know, there has been no change in the condition of the Southern Railway and they have never done business in this state, as far as I know.

170 Mr. Hall, when you made the statement in your direct examination that Judge Sommerville, before he signed the judgment, knew that the Southern Railway Co. had no representative in this city, you did not mean to say that he knew anything beyond what you had informed him?

A. That was sufficient.

Q. They could have had a representative in this State without your knowing it, could they not?

A. They could have had a representative in this state without my knowing it only on the assumption that they had misinformed me in regard to the fact.

Q. Did you ever inquire of them, prior to the verdict in this case, whether they had a representative in this state?

A. I knew that fact as well as any man can know a fact from general information and as a director on that Board and being familiar with its affairs.

Q. Were you a director on the Board of the Southern Railway Co.?

A. No, on the Board of the Terminal Co.

Q. I am not asking you with reference to representing the Southern Railway's stockholdings in the Terminal Co., but whether you were a director on the Southern Railway Co.?

A. No.

Q. You say that you had been misled and don't think they had a representative here. How were you misled or how were you misinformed?

A. Judge Lazarus, as the general counsel for the Northeastern Railroad Co., I had many interviews with Mr. Samuel Spencer, the president of the Southern Railway Co. With Mr. Harvey of the Northeastern and with Mr. Yoakum of the Frisco, I took part, in New York and elsewhere, in the deliberations which resulted in the contracts between those different roads, giving to the Frisco running rights over the New Orleans & Northeastern and over the Mobile & Ohio road and I knew from general information and general statements resulting from this intercourse that the Southern Railway Co. had no representative in this city.

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Q. Mr. Hall, as I appreciate your direct testimony, you state that the Southern Railway Co. never ran a car over the Terminal lines. Did I understand you correctly?

A. I said that the Southern Railway never ran a train on the Terminal lines. There are through shipments of cars belonging to railroads all over the country; presumably cars of every railroad in this country run over the Terminal lines, but they are operated either by the Terminal Co., the New Orleans & Northeastern or the New Orleans & Great Northern. The New York Central cars are taken over the Terminal lines, but it does no business in this state.

Q. Mr. Hall, if a partial train was made up on the lines of the Southern Railway and it was hauled to Meridian, Miss., for illustration, where it was connected with a mail train over the Northeastern and was hauled to the city of New Orleans over the Northeastern line and then over the Terminal to Chalmette where the cars were unloaded preparatory to shipment, who would pay for the trackage over the Terminal lines for the cars or as much of the train as was needed on the line of the Southern Railway, the Southern Railway Co. or the New Orleans & Northeastern?

A. I never heard of partial trains. The Southern Railway would haul a train say to Chattanooga, its train would then be broken up and the Alabama and Great Southern would make up its train, with its crew and its engine, and would include in that train any individual cars of the Southern Railway with carloads shipments for New Orleans. The A. & G. S. would haul its train to Meridian where it would again be broken up and such cars of the Southern Railway delivered to the New Orleans & Northeastern. That company would then haul its train with its engine, embracing cars from many parts of the country, to New Orleans. It would deliver to the Terminal Co. such cars as were destined for Port Chalmette. The Northeastern Co. would collect the freight, pay the charges and pro rate the freight according to trackage among the different roads partici-

172 ing in the hauling. The Terminal freight would be deducted from the gross of all the freight.

Q. The verdict is [in] this case was rendered on Jan. 16th, 1905. You learned of this and informed Mr. Henderson at once?

A. I did on the 17th.

Q. Did you wire him or write him?

A. I wrote him.

Q. Did you call for a wire in response?

A. I did not.

Q. The judgment was not signed until the 20th?

A. Presumably.

Q. You made no effort in the State Court neither to suspend the judgment nor a motion for a new trial nor did you wire counsel asking him to suspend the judgment until you could further investigate.

A. I did not for several reasons. In the first place, I was not authorized to represent the Southern Railway nor to speak for it and, in the second place, as I considered there was no citation, I did not care to make an appearance in the case without being specifically authorized.

Q. Did you ask counsel, who was in charge of the case, for indulgence without appearing in the cause?

A. As stated, I did not for the reasons given.

Q. It was some time after Mr. Henderson put in his appearance, wasn't it?

A. Yes, you can see by the filing of the bill about how long after. I filed a bill shortly after he came down here. The bill was filed on the 6th of February, 1905.

By Mr. Hall.

I offer in evidence a duly certified copy of the transcript of the Civil District Court for the Parish of Orleans, No. 74869 Ephraim Simon vs. Southern Railway Co.; the record, marked exhibit "A," then a letter from the Assistant Secretary of State, Jan. 28th, 1905, marked exhibit "B"; the charter of the New Orleans Terminal Co., marked exhibit "X."

Further hearing adjourned subject to notification by the master or agreement by the parties.

173 The Southern Railway Company

versus

Ephraim Simon.

No. 13,300.

United States Circuit Court,
Eastern District of Louisiana,
New Orleans Division,

In Equity.

Depositions of Messrs. W. W. Finley, F. E. Schumate and Walter Kennedy, witness on behalf of complainant, in the above entitled and numbered cause, residing in the City of Washington, D. C., taken before Pearce Horne, a notary public, in and for the District of Columbia, at his office, at No. 1300 Pennsylvania Ave-

nue, Northwest, in the City of Washington, D. C., on the 9th and 23rd days of July, 1908, under a commission issued out of the Clerk's Office of the said court on June 10th, 1908. Filed before the Master April 16, 1909, filed in Court January 6, 1910.

Deposition of W. W. Finley.

W. W. FINLEY being by said Notary Public first duly sworn deposed as follows:

Inty. No. 1. What is your name, age and occupation?

To the first direct interrogatory, he answers:

1. My name is William Wilson Finley; my age is 54 years. My occupation is President of Southern Railway Company.

Inty. No. 2. If in reply to Interrogatory No. 1, you state that you are the President of the Southern Railway Company, please state under the laws of what state this Company was incorporated, and where is its domicile?

To the second direct interrogatory he answers:

2. Southern Railway Company is incorporated under the laws of the State of Virginia. Its domicile is Richmond, Va.

Inty. No. 3. Please state whether or not the said Southern Railway Co. transacted or has ever transacted business in the State of Louisiana?

To the third direct interrogatory he answers:

3. Southern Railway Company does not transact and has never transacted business in the State of Louisiana, that is to say, it has never actually operated a railroad in that State. It has traffic representatives stationed in the City of New Orleans, who are employed by it for the solicitation of traffic to be routed over the lines of Southern Railway Company, via the
174 lines of connecting railroads running into the City of New Orleans and State of Louisiana, and maintains offices for such traffic agents as is the usual and customary practice

of railroad companies, in the same manner, as for instance, it maintains offices for such agents and employs such agents in the City of New York and other cities of the United States.

Inty. No. 4. State whether or not the said Southern Railway Company operated a line of Railway in the State of Louisiana or has ever operated such a line of railway?

To the Fourth direct interrogatory he answers:

4. As stated in the foregoing answer, Southern Railway Company has never operated a railroad in the State of Louisiana.

Inty. No. 5. If you state, in reply to interrogatory No. 4 that said Southern Railway Co. does not operate and never has operated a line in the State of Louisiana, what are the points nearest the State of Louisiana to which its line of railroad extends?

To the fifth direct interrogatory he answers:

5. The points nearest to the City of New Orleans to which the lines of railroad of Southern Railway Company extend are Meridian, Miss., Mobile, Ala., and Atlanta, Ga.

Inty. No. 6. What individual or corporations owns the terminals in the City of New Orleans, and also Port Chalmette and the Terminal Railway?

To the sixth interrogatory he answers:

6. The terminals referred to are owned by the corporation known as the New Orleans Terminal Company.

Inty. No. 7. What interest, if any, has the Southern Railway Co. in the said N. O. Terminal Co. If you state that it owns certain shares of stock in the said Terminal Co. state fully why and for what purpose said shares of stock were acquired.

To the seventh direct interrogratory he answers:

7. Southern Railway Company is the owner of certain shares of the stock of the New Orleans Terminal Company, its interest in which and the resultant interest in the properties owned by the New Orleans Terminal Company Southern Railway

Company acquired by reason of the development of the City of New Orleans as an important commercial and export point, and in anticipation of the possible extension, at some future day, of the lines of Southern Railway Company into the City of New Orleans.

175 Inty. No. 8. State fully and in detail, the connection of the Southern Railway Company and other Railroad Companies with the said New Orleans Terminal Co.?

To the eighth direct interrogatory he answers:

8. Under and by virtue of a joint lease, dated July 1, 1903, for the term of ninety-nine (99) years, New Orleans Terminal Company leased to St. Louis & San Francisco Railroad Company and Southern Railway Company the right to use the terminal facilities and belt railroad and other property of the New Orleans Terminal Company for the purposes of the traffic of the several lessees. The said rights were thus leased to the said lessees with the understanding that the said Terminal Company might grant to other lessees, railroad companies or company similar privileges and use, and in consideration of such right to use, and such privileges, said lessees undertook to pay certain sums of money equal to the semi-annual interest on the outstanding bonds of New Orleans Terminal Company and such sums as might be necessary to make good any deficit in the cost of operation of the property of the New Orleans Terminal Company in case the earnings thereof should not suffice to the discharge of said interest and deficit. The lessees were also given the right to nominate a subtenant or sub-tenants to use the railroad and terminal facilities of the New Orleans Terminal Company. The operations of the New Orleans Terminal Company are conducted solely by it. In the joint lease of July 1, 1903, above referred to it is specifically provided that the granting of said rights and privileges shall not be taken in any manner to affect or abridge any of the corporate franchises or powers of the New Orleans Terminal Company and that the operations of its terminal facilities and railroad shall be exclusively under its control.

Inty. No. 9. If in answer to the foregoing, you state that the said New Orleans Terminal Company has leased to the Southern R'y Co., either alone or in connection with other railroad com-

panies the right to use its terminal facilities, state to what extent and whether all of the said companies have availed themselves of the right to use the said terminal facilities?

To the ninth direct interrogatory he answers:

176 9. St. Louis & San Francisco Railroad Company for a time availed itself of its rights under said lease to use the said terminal facilities and railroad of the New Orleans Terminal Company and operated its trains into New Orleans. The New Orleans and Northeastern Railroad Company uses the properties, and the New Orleans Great Northern Railroad Company uses the passenger terminal for the operation of its passenger trains, but Southern Railway Company has never availed itself of the right to use the said terminal facilities or railroad, and has never operated its trains or any portion of them into New Orleans, none of its trains being operated to points nearer the City of New Orleans than Meridian, Miss., Mobile, Ala., and Atlanta, Ga.

Inty No. 10. State whether the Southern Railway Company has ever operated any of its trains over any railroad entering the City of New Orleans or State of Louisiana?

To the tenth direct interrogatory he answers:

10. Southern Railway Company has never operated any of its trains over any railroad entering the City of New Orleans or the State of Louisiana.

Inty. No. 11. It is alleged in this suit by Complainant that it was not and is not doing business in the State of Louisiana and that, therefore, all services of process made at the instance of the defendant, upon the Secretary of State was not a legal service. State fully any facts within your knowledge which generally will establish this contention.

To the eleventh direct interrogatory he answers:

11. The Southern Railway Company has no corporate existence in the State of Louisiana; its [it] owns no railroads or property situate in said State, and it transacts no business in the said State of Louisiana, except as I have indicated in my answers to foregoing interrogatories.

Cross-Examination.

Cross-Interrogatory No. 1.

Were you the President of the Southern Railway Company in 1904 and in January, 1905. If not, who was the president at the time inquired of, and what, if any, duties had you to perform with reference to litgiation arising out of personal injuries prior to January, 1905, and what supervision, if any,
177 did you then exercise, and what supervision and authority do you presently exercise, over litigation arising out of personal injuries in consequence of the acts of your road or of its associate lines or connecting carriers?

To the first cross-interrogatory he answers:

1. I was not President of Southern Railway Company in 1904 or January 1905. The President of Southern Railway Company at said times was Mr. Samuel Spencer, now deceased. I was at said times Second-Vice President of Southern Railway Company, and as such resident executive officer at Washington, in general charge and control of the business and operations of the company subject to the President. My duties in respect to such litigations were such as come under my general control of the affairs of the company. The status of my relations to such matters is still the same. As President of the Company I exercise general control of all of its affairs, including the conduct of litigations to which it is made a party or in which it may be interested.

Cross-Interrogatory No. 2.

State whether the Southern Railway Company is incorporated or holds franchises under the laws of any other State than the State of Virginia. If so, and by public act refer to the statute granting the said Southern Railway Company corporate existence in any other State than Virginia or granting it franchises to operate a road through any other State than the State of Virginia.

To the second cross-interrogatory he answers:

2. Southern Railway Company, as stated in my direct examination, is incorporated under the laws of the State of Vir-

ginia. By comity between other states and the State of Virginia, and by reason of the compliance by Southern Railway Company with the laws of other states, it is empowered to transact and does transact business in divers other states of the United States, to-wit: the States of North Carolina, South Carolina, Georgia, Alabama, Mississippi, Florida, Tennessee, Kentucky, Indiana and Illinois.

Cross-Interrogatory No. 3.

178 What are the relations of the Southern Railway Company with the New Orleans and Northeastern Railroad Company, or the Mobile & Ohio Railroad Company, and what are the traffic arrangements between said Southern Railway Company and the roads inquired of, and how is the business of said roads operated through the Southern Railway Company, or the Southern Railway Company's business operated through the said railroads, and if the contracts are in writing and under private signature attach copies thereof to this deposition, viseeing each copy by your signature to the same, and if by public act, state where copies of the said acts can be secured, before what notary or commissioner the same were passed, and whether they are retained in the office of the said notary or commissioner as part of his archives from which copies can be made?

To the third cross-interrogatory he answers:

3. The relations between Southern Railway Company and New Orleans & Northeastern Railroad Company, and between Southern Railway Company and Mobile & Ohio Railroad Company, are the usual relations existing between friendly connecting carriers, that is to say, Southern Railway Company exchanges traffic at junction points with the said two railroads, and they in turn exchange traffic with Southern Railway Company; the connecting railroads participating, each with the other, in the transportation of traffic passing over both lines, and in the revenues derived therefrom, which are collected and distributed between the lines by their respective accounting departments. There are no written formal agreements between Southern Railway Company and the roads named in respect of their relations, and no public acts except the general laws of the states governing railroad operations, of which I am aware. Southern Railway

Company is owner of certain shares of the stock of Mobile & Ohio Railroad Company but has no direct interest, financial or otherwise, in the New Orleans and Northeastern Railroad Company. Both of the said companies are entirely separate and distinct corporations from Southern Railway Company and are operated independently of it.

Cross-Interrogatory No. 4.

179 Under direct Interrogatory No. 8, you were asked to state fully and in detail the connection of the Southern Railway Co. and other railroad companies with the New Orleans Terminal Co. Is it not a fact that the Southern Railway Company, acting conjointly with the St. Louis & San Francisco Railroad Company, are the lessees of the property of the New Orleans Terminal Co. under a lease dated July 1st, 1903? If so, you are required to attach a copy of the said lease to your deposition and visée the same with your signature to prove its correctness and any other contract or modification of said contract of lease herein inquired of made prior to January 18th, 1905?

To the fourth cross-interrogatory he answers:

4. Southern Railway Company and St. Louis & San Francisco Railroad Company are lessees or grantees of the right to use the terminal facilities and property of the New Orleans Terminal Company under a lease dated July 1, 1903, a full copy of which identified by my signature on the cover is attached to my deposition as a part thereof. No modification of this contract was made prior to January 18, 1905.

Cross-Interrogatory No. 5.

Where are the records kept of the earnings and disbursements of the leased line of the New Orleans Terminal Company, and will said records show the operating expenses of said leased line by the Southern Railway Company and the St. Louis & San Francisco Railroad Company, the lessees thereof, and will the records show the earnings of said leased line and the distribution thereof, or if a loss has been sustained, the contribution made by the respective lessees of said line under the lease hereinbefore inquired of with reference to the Terminal property?

To the fifth cross-interrogatory he answers:

5. The records of the earnings and disbursements of the leased line of the New Orleans Terminal Company are kept in the office of the Auditor of the Terminal Company, Mr. L. A. Jones, at New Orleans. I assume that these records will show the matters and things inquired of.

180 Cross-Interrogatory No. 6.

Is it not a fact that the Southern Railway Company maintained for the transaction of its business in the City of New Orleans two offices, one under the direction of J. C. Andrews, its authorized representative and agent, for the transaction of its passenger business, and the other under the direction of James B. Graham, its freight agent, for the transaction of its freight business, with authority to issue bills of lading for freight received at this end and to be shipped over its lines and the connecting carriers thereof and to make freight rates for the shipment into New Orleans of freight of every character for the Southern Railway Company through its connecting carriers into the City of New Orleans, and are not the agents inquired of in the employ of the said Southern Railway Company and paid by it, and is not the office rent and other necessary disbursements in the conduct of the business in New Orelans paid by the Southern Railway Company, and is it not a fact that no other representative or agent of the Southern Railway Company is invested with greater power except for the service of citation or was in the months of December, 1904, and January, 1905?

To the sixth cross-interrogatory he answers:

6. It is not a fact that Southern Railway Company maintains for the transaction of its business in the City of New Orleans, two offices, one under the jurisdiction of J. C. Andrews, its authorized representative and agent, for the transaction of its passenger business, and the other under the direction of James B. Graham, its freight agent, for the transaction of its freight business, with authority to issue bills of lading for freight received at this end and to be shipped over its lines and the connecting carriers thereof and to make freight rates for the ship-

ment in New Orleans of freight of every character for the Southern Railway Company through its connecting carriers into the City of New Orleans.

Southern Railway Company does employ the gentlemen named, as stated in my direct examination, only for the purpose of soliciting traffic, and for the performance of duties
181 in connection with the solicitation of traffic to be routed via the lines of the Southern Railway Company. They have no authority whatever to issue and do not issue bills of lading, and they have no authority to make and do not make rates. They have on file and publish rates for the information of the public, but they have nothnig to do with the making of them. Their duties are to solicit traffic for Southern Railway Company. They are in the employment of Southern Railway Company and are paid by it for the purpose aforesaid, and Southern Railway Company pays rent for their offices for such use. It is not a fact that no other representative or agent of Southern Railway Company is vested with greater power than the agents named, except for the service of citation, or was in the months of December 1904 and January 1905. The authority of the two agents named is limited as above stated to the solicitation of traffic for transportation by Southern Railway Company.

Cross-Interrogatory No. 7.

Have you any personal knowledge of the injuries sustained by the plaintiff in the original cause, or of any of the facts set out by the Southern Railway Company in its bill of complaint in this case? In answering this question you are restricted to stating things which are to you personally known and not those things, incidents or acts which have been communicated to you by others.

To the seventh cross-interrogatory he answers:

7. I have no personal knowledge of the injuries sustained by the plaintiff on the original cause.

Cross-Interrogatory No. 8.

If assisted in preparing your answers or in answering the direct or cross-interrogatories propounded, by whom were you assisted, and what interest had your assistant, professional or otherwise, in the Southern Railway Company?

To the eighth cross-interrogatory he answers:

8. I was not assisted in preparing these answers,
182 except clerically. All of the facts testified to are facts within my own knowledge.

And further affiant saith naught.

(Signed) W. W. FINLEY

Sworn to and subscribed before me this 9th day of July, 1908.

(Signed) PEARCE HORNE

[Seal] Notary Public in and for the District of Columbia.

My commission expires January 17th, 1911.

Deposition of Walter Kennedy.

The said witness, WALTER KENNEDY, being by said Notary Public first duly sworn, deposes as follows:

Direct-Examination.

Inty. No. 1. What is your name, age and occupation and what was your occupation in 1904?

To the first direct interrogatory he answered:

1. Walter Kennedy, forty-one years of age, now Law Agent of the Southern Railway Company; Assistant Chief Law Agent of Southern Railway Company in 1904.

Inty. No. 2. State whether or not you have ever had an interview or conversation with Ephraim Simon, defendant, concerning his alleged injury on the 8th of February 1904? If so, state fully the time and place of the said conversation? What was said by the said Simon and in whose presence the interview occurred?

To the second direct interrogatory he answered:

2. On April 4, 1904, in company with Dr. E. D. Martin of 513 Canal Street, New Orleans, Louisiana, I called at 416 Chartres Street, New Orleans, Louisiana, which is the residence and place of business of Ephraim Simon. Dr. Martin at my instance made a personal examination of the ankles and feet of the said Simon, and at the conclusion of this examination I approached Simon for a settlement of his claim. The said Simon declined to enter into any negotiations for a settlement of his claim and referred me to his counsel, Henry L. Lazarus, of the City of New Orleans; this conversation was in the presence of Dr. E. D. Martin.

183 Inty. No. 3. State whether or not you have ever had, in this connection, an interview with H. L. Lazarus. If so, state when and where, and repeat the conversation as nearly as you are able to do so?

To the third direct interrogatory he answered:

3. When my interview was terminated by Simons [Simon] declining to discuss a settlement of his claim with me, I then repaired to the office of his counsel, Henry L. Lazarus. I introduced myself to the said Henry L. Lazarus, stated to him my official connection with the Southern Railway Company, and the purpose of my visit which was the discussion of the claim of Ephraim Simon against the Southern Railway Company with a view of looking towards a settlement of same if a satisfactory amount could be arrived at. Henry L. Lazarus, after some discussion of Simon's claim for injuries received, made me a proposition to settle the claim of Simon for the sum of five thousand dollars. This proposition I declined, as I stated to him that the railway company would not entertain such an amount. I argued the question at some length with Lazarus as to the unreasonableness of the figures that he suggested and tried to get him to modify his views. He, however, remained firm in his demands and declined to accept anything less than the sum of five thousand dollars. I finally offered him the sum of seven hundred and fifty dollars, which offer he declined, and when I saw that a further discussion of the matter at that time would be of no avail I left the matter in that condition until a more

conservative demand should be made by the said Lazarus as counsel for the said Simon, as I entertained the opinion that I would hear further from the said Lazarus.

Inty. No. 4. What was apparently Mr. Simon's condition when you saw him, and what was he doing, at the time?

To the fourth direct interrogatory he answered:

4. When I called on Simon at his place of business in company with Dr. E. D. Martin I found him sitting up, dressed with the exception of his shoes being off, and so far as I could judge from the general surroundings he was supervising his business. The only complaint that Simon made of the injury, as I now recall, was a sprain of both ankles which objectively showed some signs of swelling.

184 Inty. No. 5. The bill is brought by the Southern Railway Company to set aside a default judgment of the Civil District Court for the Parish of Orleans, for $13348.00 in favor of Ephraim Simon and against the Southern Railway Company, being the estimate placed by him as damages sustained by reason of personal injuries alleged to have occurred in a railway accident on or about the 8th of February 1904? State fully and [any] facts within your knowledge in this connection which would show the exaggerated character of this estimate.

To the fifth interrogatory he answered:

5. Simon conducts a business of manufacturing ladies' skirts or a tailoring business of some such nature at 416 Chartres Street, New Orleans. When I visited him at his place of business on April, 4, 1904, with Dr. Martin I found Simon there. He was seated in a chair, with his shoes off, and his feet resting on another chair. So far as I was able to observe, his business was going on, with people, evidently employees, about the place. He seemed to me to have charge of his business. Otherwise than that I could see by his posture and the resting of his feet upon an opposite chair, and some swelling of his ankles, I could discover no evidence of serious injury to Simon, and I do not recall that while I was present Simon made any complaint of pain or suffering, and I did not observe from his facial expression or his motions any evidence of serious injury.

Cross-examination.

Cross-Interrogatory No. 1.

Are you the same Walter Kennedy who made an affidavit on the 3d March, 1906, in the case of Southern Railway Co. vs. E. Simon? Is it not a fact that all that Mr. Lazarus said in connection with the adjustment of the claim asserted by Simon was that he would recommend an adjustment upon figures which he (Lazarus) then named, but which you declined to entertain?

To the first cross-interrogatory he answered:

1. I am the same Walter Kennedy that made an affidavit in the above entitled cause of action on the third day of March, 1905, not 1906.

Henry L. Lazarus, as counsel for Simon, made me a proposition of five thousand dollars in settlement, which I de-
185 clined, as I considered it exorbitant. I made him a counter proposition of seven hundred and fifty dollars, which I thought was reasonable, but which Lazarus would not entertain.

Cross-Interrogatory No. 2.

You are not a physician or surgeon and would not undertake, as claim agent charged with the adjusting of losses, to state the physical condition of a man from appearances and without having the advantage of a personal examination aided by skilled surgeons, would you?

To the second cross-interrogatory he answered:

2. I have no technical knowledge of surgery, though I have had twenty years experience in the observation of injured people. I did have a physical examination made of Simon in my presence by a surgeon, Dr. E. D. Martin of New Orleans, Louisiana. Where the injuries complained of can be detected by the eye I think I can form an opinion as to the extent of such injuries.

Cross-Interrogatory No. 3.

As a matter of fact, have you any personal knowledge of the accident? If yea, state how you acquired the same, if you were

present when it happened, what injuries were sustained by Simon, their duration and their present effect, whether temporary or permanent, and whether as a matter of fact all the knowledge that you have in relation to this matter has not been gathered by statements made by your employees or persons called in by you or your company to assist in the investigation of the accident, its cause and the resulting injuries therefrom.

To the third cross interrogatory he answered:

3. I was not present when the accident took place and have no personal knowledge of the circumstances. My opinion as to the character and extent of Simon's injury is predicated on what I saw of Simon's ankles and feet, as well as the physical examination that was made in my presence by a surgeon.

Cross-Interrogatory No. 4.

186 If assisted in preparing your answers or in answering the direct or cross-interrogatories propounded, by whom were you assisted, and what interest did your assistant, professional or otherwise, have in the Southern Railway Co.?

To the fourth cross-interrogatory he answered

4. I had the assistance of a stenographer and typewriter to whom these answers were dictated and taken down.

Further deponent saith naught.

(Signed) Walter Kennedy.

Sworn to and subscribed before me this twenty-third day of July, 1908.

(Seal) (Signed) Pearce Horne

Notary Public.

Deposition of F. E. Shumate.

The said witness, F. E. Shumate, being by said Notary Public first duly sworn, deposed as follows:

Direct-Examination.

Inty. No. 1. What is your name, age and occupation? What was your occupation in 1904?

To the first direct interrogatory he answered:

1. F. E. Shumate, thirty-five years of age, occupation, Law Agent of Southern Railway Company. My occupation in 1904 was the same as at present.

Inty. No. 2. State whether or not you had an interview or any conversation or conversations with defendant, Ephraim Simon, in connection with his alleged injury, made the basis of this suit; and, if so, when and where they took place?

To the second direct interrogatory he answered:

2. I have had two conversations with Mr. Simon, on March 3, 1904, at his place of business at 416 Chartres Street, New Orleans, Louisiana.

Inty. No. 3. Please state fully such conversation or conversations and in the presence of whom the same occurred.

To the third direct interrogatory he answered:

3. I had two conversations with Mr. Simon on the same day. The first in the presence of Mr. J. C. Andrews, and the second in the presence of Dr. Denegre Martin. In the first
187 conversation I asked Mr. Simon about the facts of the accident and the nature and extent of his injury, and he told me that he was a passenger on a train which was in an accident near York, Alabama, a short time before, and that he had sustained injuries to both ankles. I then asked him if he would submit to an examination by Dr. Denegre Martin, and he said he would. Later in the day I returned with Dr. Martin and he made the examination, and I then told Mr. Simon that I desired to settle the matter with him, and started to discuss the settlement with him. He refused to discuss the matter with me and referred me to Mr. H. L. Lazarus, of 830 Common Street, whom he said he had employed to represent him as his attorney,

and that any settlement would have to be made with him. He said that he would make no settlement independent of Mr. Lazarus, and any settlement made by him would be satisfactory.

Inty. No. 4. State whether or not you had any conversation with Mr. H. L. Lazarus in this connection, and, if so, state in whose presence the said conversation occurred and state fully the substance of the same?

To the fourth direct interrogatory he answered

4. I had a conversation with Mr. H. L. Lazarus at his office in the presence of J. C. Andrews the same day I saw Mr. Simon. I told Mr. Lazarus that I was there for the purpose of settling the Simon case, which I understood was in his hands. He asked me to make a proposition and I offered him three hundred dollars. He said that he would not take that if I made it that many thousand. I told Mr. Lazarus that either myself or some other representative of the Southern Railway Company would call to see him again about the matter.

Inty. No. 5. If you say that you saw the defendant Simon, on or about the 3rd of March, 1904, state what he was doing and what was his occupation if any?

To the fifth interrogatory he answered

5. At the time I saw Mr. Simon on the third day of March, 1904, he was at the back of his store overseeing the work that was going on and giving directions as to its conduct.

Inty. No. 6. Did you or not have any conversation
188 with Simon's physician, Dr. Gaudet. If so, state the time and the substance of that conversation?

To the sixth interrogatory he answered

6. I did have a conversation with Dr. Gaudet at his home either on March third or March fourth, 1904. I asked Dr. Gaudet if he knew Simon, and if he had waited upon him for any injury to his ankles, and, if so, what the nature and extent of the injuries were. Dr. Gaudet stated that he had called to see Simon within thirty-six hours after the accident and found both of his ankles sprained, with indications of external violence. The doc-

tor further said that the condition of Mr. Simon's ankles had improved at that time and that he thought he would be all right in three or four weeks. This is all the conversation I recollect.

Inty. No. 7. This bill has been filed by the Southern Railway Co. to annul a judgment obtained by the Defendant, in the Civil District Court for the Parish of Orleans, for the sum of $13348, damage alleged to have been suffered by the defendant by reason of a railroad accident alleged to have occurred on the Southern Railway Company on or about the 8th of February 1904. State fully any facts within your knowledge which will show the condition of the defendant when you saw him, or any statement made by himself or Counsel which will support Complainant's allegation that the said statement of injury was exaggerated.

To the seventh interrogatory he answered

7. From what I saw of Mr. Simon and the way he was conducting his business at the time, and the appearance of his ankles, I would say that his claim is very much exaggerated in my opinion.

Cross-Examination.

Cross-Interrogatory No. 1.

Are you the same F. E. Shumate who made an affidavit on the 3d March, 1906, in the case of Southern Railway Company vs. E. Simon? Is it not a fact that all that Mr. Lazarus said in connection with the adjustment of the claim asserted by Simon was that he would recommend an adjustment upon figures which he (Lazarus) then named, but which you declined to entertain?

To the first cross-interrogatory he answered:

1. I am the same F. E. Shumate who made an affidavit in connection with this case, which, however, was made in March, 1905, instead of March 3, 1906.

It is not a fact. I have stated in my direct examina-
189 tion all that passed in reference to amounts between Mr. Lazarus and myself.

Cross-Interrogatory No. 2.

You are not a physician or surgeon and would not undertake, as claim agent charged with the adjusting of losses, to state the physical condition of a man from appearances and without having the advantage of a personal examination aided by skilled surgeons, would you?

To the second cross-interrogatory he answered:

2. I am not a physician or surgeon, and have no particular technical knowledge that would enable me to state the physical condition of a man from appearances, without having the advantage of a personal examination aided by skilled surgeons, but I personally examined Mr. Simon's ankles, and from about thirteen years experience in handling personal injuries, and in being with skilled surgeons when making examinations, I think that my judgment upon the condition of an injury from its appearances, etc., is fairly good, and that I am able to give a pretty good idea of what such injuries amount to where they are open and all the symptoms are objective.

Cross-Interrogatory No. 3.

As a matter of fact, have you any personal knowledge of the accident? If yea, state how you acquired the same, if you were present when it happened, what injuries were sustained by Simon, their duration and their present effect, whether temporary or permanent, and whether as a matter of fact all the knowledge that you have in relation to this matter has not been gathered by statements made by your employees or persons called in by you or your company to assist in the investigation of the accident, its cause and the resulting injuries therefrom.

To the third cross-interrogatory he answered:

3. I have no personal knowledge of the accident and was not present when it happened. I know what injuries were sustained by Simon from having seen him and examined his injuries in company with a surgeon called for that purpose.

Cross-Interrogatory No. 4.

190 If assisted in preparing your answers or in answering the direct or cross-interrogatories propounded, by whom were you assisted, and what interest had your assistant, professional or otherwise, in the Southern Railway Company?

To the fourth cross-interrogatory he answered:

4. I delivered my answers to these interrogatories orally and they were taken down and written out by a stenographer.

Further deponent saith not.

(Signed) F. E. Shumate.

Subscribed and sworn to before me this twenty-third day of July, 1908.

(Signed) Pearce Horne (Seal)

Notary Public.

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191 Exhibit B. Filed with Deposition of W. W. Finley before Master April 26, 1909, Filed in Court Jan. 6, 1910. Identified with signature of "W. W. Finley" on face of Exhibit.

Original Joint Lease.

New Orleans Terminal Company

To

St. Louis and San Francisco Railroad Company

And

Southern Railway Company.

Dated July 1st, 1903.

Term, 99 Years.

192 New Orleans Terminal Company.

Original Joint Lease.

Dated July 1, 1903.

An indenture, made and entered into, this first day of July, 1903, by and between the New Orleans Terminal Company, a corporation organized and existing under and by virtue of the

laws of the State of Louisiana, (hereinafter called the "Terminal Company") party of the first part, and St. Louis and San Francisco Railroad Company, a corporation organized and existing under and by virtue of the laws of the State of Missouri, and Southern Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Virginia (hereinafter called the lessees, parties of the second part, and The Standard Trust Company of New York, a corporation organized and existing under and by virtue of the laws of the State of New York, as Trustee, (hereinafter called the "Trustee"), party of the third part.

Whereas the Terminal Company is the owner of certain belt railroads and other terminal facilities in and about the City of New Orleans, in the State of Louisiana, and the said lessees are severally desirous of obtaining from the Terminal Company the right to use all of the said belt railroads, terminal facilities and other property of the Terminal Company for the purposes of the traffic of said several lessees; and

193 Whereas it is necessary that the said railroad property and terminal facilities of the Terminal Company shall be added to, enlarged, improved and completed; and

Whereas the Terminal Company is about to issue its first mortgage gold bonds, bearing even date herewtih, and in order to secure the same is about to execute and deliver to the Trustee aforesaid its mortgage and deed of trust bearing even date herewith, to be called the First Mortgage, and by the terms of said mortgage it is provided that the amount of bonds to be issued thereunder and secured thereby shall not exceed in aggregate face value the sum of fifteen million dollars, at any one time outstanding, and that said bonds shall be issued in lettered series bearing divers rates of interest not exceeding four per cent. per annum, and shall mature fifty years after the date thereof, which said mortgage and deed of trust will be a first lien upon all the railroad property, corporate rights and franchises of the Terminal Company; and

Whereas the first issue of bonds to be made under said mortgage and deed of trust is to be of Series A, bearing interest at the rate of four per cent. per annum, in the aggregate amount of three million dollars, and further issues of said bonds are to be made from time to time hereafter by the Terminal Company

for the purpose of completing, enlarging, improving and adding to the property and facilities of the Terminal Company; and,

Whereas it is the intent of the parties hereto that this indenture shall furnish additional security for said bonds; and,

Whereas each of the said lessees is the owner of one million dollars in par amount of the shares of capital stock of the Terminal Company, and the total par amount of the shares of the capital stock of the Terminal Company is two million dollars.

194 Now, therefore, this indenture witnesseth:

That the Terminal Company, for and in consideration of the premises and of the agreements on the part of the lessees, respectively, to be by them severally kept and performed, as hereinafter mentioned, hath granted, demised and leased and doth hereby grant, demise and lease unto each of the lessees, parties of the second part, and to their several successors and assigns, the equal right and privilege of using for the purposes of its traffic all and singular the railroad, railway tracks, stations, appendages and terminal facilities of the Terminal Company in and about the City of New Orleans in the State of Louisiana; and also all improvements and enlargements thereof and all additions thereto which may hereafter be constructed or acquired, and also any other lines of railroad which may be hereafter constructed or acquired by the Terminal Company for the common use of the parties hereto; together with all the franchises, rights and privileges at any time possessed by the Terminal Company, in any wise belonging or appertaining to such railroad, railway tracks, stations, appendages and terminal facilities, or the enlargement thereof or additions thereto, or to said additional lines of railroad;—only to the extent, however, that may be necessary and sufficient to enable each lessee to use and enjoy, for the purposes of its business, the rights and privileges hereby granted, demised and leased.

Provided always and it is hereby expressly agreed that the rights and privileges of using the railroad, stations and other property of the Terminal Company hereby granted to each lessee shall be exercised in common with the Terminal Company and with the other lessee and with such other company or companies as may hereafter from time to time obtain from the Terminal Company a grant or lease of similar or other rights,

privileges and uses thereof; and that nothing contained herein shall be taken in any manner to affect or
195 abridge any of the corporate franchises or powers of the Terminal Company to use and operate such railroad and all other its property aforesaid on its own behalf; to grant to one or more other companies terminal facilities, similar in part or in whole to those hereby granted, and at all times to perform and exercise all corporate franchises, powers and privileges which it may at any time possess; but not, however, in any manner to impair the rights and privileges hereby granted to the lessees respectively.

To have and to hold the said rights and privileges as aforesaid unto each of the lessees, its successors and assigns, from the first day of July, 1903, for and during the full term of ninety-nine years next ensuing, each lessee, its successors and assigns, yielding and paying therefor unto the Terminal Company, its successors and assigns, at the times and in the manner hereinafter specified, the rent hereinafter reserved, and keeping and performing, all and singular, the covenants and agreements hereinafter set forth to be by each of the leseses fully kept and performed.

Article I.

Covenants of the Lessees.

And the lesees, in consideration of the premises, have severally covenanted and agreed, and by these presents do severally covenant and agree, each for itself, to and with the Terminal Company and to and with the Trustee—the covenants of the lessees being several and not joint—as follows:

Section 1. Each of the lessees shall and will yearly, on the first day of January in every year during said term, pay, or cause to be paid, to the Terminal Company at its proper office, the sum of $5 lawful money of the United States, without any previous demand being made therefor, and free and clear of all deductions and charges whatever,
196 which payment shall be made in addition to the rentals hereinafter mentioned.

Sec. 2. Each of the lessees shall and will well and truly pay, or cause to be paid, to the Trustee semi-annually, on the 15th day of June and on the 15th day of December, in each year during the first fifty years of said term, in gold coin of the United States, of or equal to the present standard of weight and fineness, free and clear of all taxes, charges, impositions and assessments whatever, without any previous demand therefor, a sum of money which shall be equal to one-half of the semi-annual interest on all outstanding bonds from time to time issued under said First Mortgage, and used for the following described purposes, or for any thereof, to-wit:

(a) On $3,000,000 in face amount of said bonds to be forthwith issued.

(b) On all of said First Mortgage bonds which, or the proceeds of which, shall be from time to time hereafter used in payment of the cost of elevation, depression, enlargements and improvements of and additions to the railroad, terminals, lands and property of the Terminal Company to be hereafter made, and for acquiring other railroads and railroad property by the Terminal Company, the common use of all of which has been, or shall be, granted to the lessees; provided, however, that the amount of bonds to be issued for any of the purposes in this subdivision named shall in no case exceed, taken at their market price, the cost of such elevation, depression, enlargements, improvements, additions, extensions or acquisitions of other railroads or property; and such cost shall be proven and shown by the certificate of the President and affidavit of the Auditor or Treasurer of the Terminal Company; and provided further, that any and all rental, other than operating and maintenance expenses, stipulated to be paid for the use of the property of the Terminal Company by other railroad companies not parties hereto which may hereafter be admitted to the joint use of said property, as hereinafter provided, (other than nominees of either of the Railroad Companies, parties of the second part, who may use said property of the Terminal Company as subtenants and under the leasehold rights hereby vested in said Railroad Companies, parties of the second part hereto, as hereinafter provided), shall be paid to the Trustee and shall be by it applied towards the payment of the interest accruing upon the said bonds of the Terminal

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Company, and one-half of the amount of all such payments to the Trustee shall be credited upon the obligation of each of the Railroad Companies, parties of the second part hereto, to contribute to the fund for the payment of such interest.

Sec. 3. Each lessee shall and will well and truly pay, or cause to be paid, to the Trustee semi-annually, on the 15th day of June and on the 15th day of December in each year, during the first fifty years of said term, as rental for the use and enjoyment of such portions of the property of the Terminal Company as may be hereafter held by such lessee in severalty and for its exclusive use under this lease, in gold coin of the United States, of or equal to the present standard of weight and fineness, free and clear of all taxes, charges, impositions and assessments whatever, without any previous demand therefor, a sum of money which shall be equal to the entire semi-annual interest on all bonds issued by the Terminal Company,

(a) in acquiring such portions of the property of the Terminal Company as may be so held by such lessee in severalty and for its exclusive use; and

(b) for payment of the cost of elevation, depression, enlargements and improvements of and additions to the tracks, terminals and other property of the Terminal Company, both made and to be made, the exclusive use of which is, or may
198 hereafter be, secured to such lessee by the Terminal Company.

Sec. 4. Each lessee shall and will well and truly pay, or cause to be paid, to the Trustee fifty years from and after the date hereof, and on the day of the maturity of said bonds issued under said First Mortgage, one-half of the principal amount of all bonds issued and used for the purposes above described in section 2 of this Article I and the entire principal amount of all bonds issued and used for the benefit of such lessee for the purposes above described in section 3 of this Article.

Sec. 5. Whereas the foregoing rentals and payments of the principal required to be made by said lessees, respectively, under this joint lease shall be security for and shall be applied by the Trustee to the payment of the interest and principal, respectively, of the bonds to be issued under said First Mortgage,

each lessee hereby covenants and agrees to and with the Trustee, that in consideration of this lease and the agreements and undertakings on the part of the Terminal Company herein contained, and in further consideration of the making of said First Mortgage and the issue of said bonds thereunder, as above provided, so long as any such bonds issued under and secured by such First Mortgage shall be outstanding and unpaid, the rentals aforesaid and the final payment of the principal of said bonds shall be paid absolutely and directly to the Trustee, and at such place and with such depositary as the Trustee may designate, without abatement, defense or claim of setoff on account of any act, omission or liability of the Terminal Company to the lessees, or to either of them, by reason of any breach or failure on the part of the Terminal Company in the performance of any of the covenants in this lease mentioned as to any matter or thing whatsoever, provided that the obligation of each lessee to
199 pay rent under this joint lease (except said annual rental of $5.00) shall terminate on the final payment of the interest and principal provided for in the preceding sections 2, 3 and 4 of this Article I; and the Trustee shall apply all moneys so paid to it, to the payment of interest and principal, as aforesaid.

Sec. 6. To the end that the purchasers of the said bonds of the Terminal Company may have evidence of the security intended to be afforded by this agreement, the lessees hereby severally agree with one another and with the other parties hereto, to guarantee, and each of them hereby does, for value received, guarantee to the present and future holders and registered owners of all said bonds that may be issued under the First Mortgage of the Terminal Company, the due and punctual payment, in gold coin, of one-half of the principal and interest of each and every of said bonds; and to that end the lessees will execute an instrument of guaranty endorsed upon each of said bonds in the following form, viz.:

"For value received, St. Louis and San Francisco Railroad Company and Southern Railway Company hereby jointly and severally guarantee, to the lawful holder or registered owner hereof, the due and punctual payment by New Orleans Terminal Company of the principal and interest of this bond, in gold coin of the United States of America.

In witness whereof the said companies have duly executed this guaranty.

ST. LOUIS AND SAN FRANCISCO
RAILROAD COMPANY,

By .....
Vice-President.

SOUTHERN RAILWAY COMPANY,

By .....
Vice-President.

200 Neither this guaranty nor the guaranty upon any bond shall be deemed to be waived by any extension that any bondholder or the Trustee may give to the Terminal Company, nor by any action of the Trustee or the Terminal Company, nor in any other way except by the payment of the whole of said bonds, principal and interest No provision in this instrument or in said First Mortgage or bonds is intended in any way to limit, so far as any holder or registered owner of any of said bonds is concerned, the liability of either of said lessees upon the guaranty engraved upon said bonds or in this article set forth, it being the intention of said lessees that said guaranty, so far as said bondholders are concerned, shall be absolute and unconditional.

Sec. 7. After the date hereof the Terminal Company shall exclusively manage, operate and maintain every portion of the property of the Terminal Company, the common use of which is hereby granted to the lessees; and the entire cost of the management, operation, maintenance, repair and renewal of, and all taxes, liens, water rents and assessments on said railroad, buildings ad facilities, the common use of which is hereby granted to the lessees, and the entire cost of the management, operation, maintenance, repair and renewal of and all taxes, liens, water rents and assessments on, all enlargements and improvements thereof and additions thereto, and on and to any railroad or other property hereafter acquired by the Terminal Company for the common use of the lessees, shall be borne by and divided

between the lessees in the proportion that the number of cars of every kind moved over the various portions of the tracks of the Terminal Company by or for each lessee, or its nominee or nominees, bears to the whole number of cars moved thereover; and for the purpose of distributing such cost, the Terminal Company shall divide its railroad and property, including all appurtenances, into such sections as
201 may be necessary in order to equitably distribute such cost of the management, operation, maintenance, repair and renewal of and all taxes, liens, water rents and assessments on said several sections, among the lessees in proportion to their respective uses of such sections; and the Terminal Company may, from time to time, change such sectional divisions the better to subserve the purpose and intent aforesaid.

Sec. 8. The Terminal Company shall keep accurate accounts of all such cost of management, maintenance, operation, repairs, renewals, taxes and assessments and shall furnish to each of the lessees a detailed monthly statement of the same on or before the 25th day of the month succeeding the month for which such statement is rendered, and the amount due from each of the lessees to the Terminal Company on such accounts shall be paid within fifteen days after such statement shall have been rendered to such lessee.

Article II.

Covenants of the Terminal Company.

And the Terminal Company, party of the first part, has covenanted and agreed, and does hereby covenant and agree to and with the lessees, respectively, and to and with the Trustee, as follows:

Section 1. The Terminal Company shall and will maintain and renew, during the term hereby demised, its corporate existence and organization, so long as permitted by law so to do, and at all times and from time to time during said term shall and will put forth and exercise each and every corporate power and do each and every corporate act which the Terminal Company might

now, or at any time hereafter, put forth or exercise to
202 enable each of the lessees to enjoy and avail itself of and exercise every right, franchise and privilege hereby granted, according to the terms of this lease, and will not commit or omit, or suffer or allow to be committed or omitted, any act whereby its corporate existence and powers may be annulled, abridged or affected.

Sec. 2. The Terminal Company shall, with all convenient speed, construct and complete its several lines of railroad and terminal facilities, and for that purpose will procure the right of way, dock properties, lots and lands necessary to construct said lines of railroad, and furnish all necessary facilities in the way of docks, sidings, double tracks, switches, yards, turntables, engine houses, passenger and freight depots and sheds and other structures.

Sec. 3. The Terminal Company shall and will keep and maintain in proper repair, working order and condition all the tracks, structures, terminal facilities and other property, the common use of which by the lessees, with the Terminal Company, has hereinbefore been granted, using the best and most suitable materials for the renewal of the same, as renewals shall become from time to time necessary, and shall and will also supervise and manage the use of the same so that the several lessees may and shall be enabled fully and properly to conduct their legitimate traffic and business over the same according to the intent of this agreement; and the Terminal Company will from time to time, and as often as may be necessary and practicable, enlarge its said property and terminal facilities, and construct additional tracks and other structures, (charging the cost thereof to its capital account) in order that all the business of the lessees may be conducted over said premises with reasonable convenience and economy; and in case of any grants of the right to use said premises, or any part thereof, to other lessees, the Terminal Company shall and will, from
203 time to time, and as often as may be necessary, increase its tracks and terminal facilities, so that the trackage, user and terminal facilities hereby granted to the lessees, respectively, shall not be impaired or diminished thereby.

Article III.

Mutual Covenants.

And it is mutually covenanted and agreed by and between the parties hereto, as follows:

Section 1. No railroad company, other than the lessees, shall be admitted to the common use of the demised premises of the Terminal Company except on such terms as shall be unanimously approved by the Board of Directors of the Terminal Company.

Sec. 2. Except as hereinafter provided, the engines and cars of each of the lessees, while on the railroad and property of the Terminal Company, shall be managed by the employees of such lessee company, subject, however, to the rules and directions of the Terminal Company. Schedules for the movement of through trains over the main tracks of the Terminal Company shall be arranged by joint action of the parties hereto. All trains of each lessee shall have the right of way over all other trains of an inferior class, but there shall be no discrimination between the lessees in the movement of their trains of the same class.

Sec. 3. Neither of the lessees shall employ, or retain in its employ, in the running of its trains, engines or cars upon the tracks of the Terminal Company any employe who may be objectionable or unsatisfactory to the Terminal Company after notice shall have been given by the Terminal Company of its objection to such employe; and the Terminal Company will at any time remove or transfer any officer or employe, of a grade lower than that of Superintendent, upon the written notice of either lessee stating the incompetency, unfitness or unfairness of such officer or employe.

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Article IV.

Liability for Injuries and Damages.

And it is further mutually covenanted and agreed by and between the parties hereto as follows:

Section 1. The Terminal Company shall not be considered in any sense an insurer at any time of the safe condition of its tracks, bridges, fences or other structures forming any part of the demised premises. All officers and employes of the Terminal Company charged with the construction, operation, maintenance, repairs or renewals of the railroad and property of the Terminal Company, for the purpose of determining the liability of the respective parties hereto, in every given instance, as between said parties, shall be considered and held to be joint officers and employes of the Terminal Company and the lessees, when engaged in duties relating to the common use and operation of said railroad and property of the Terminal Company.

Sec. 2. Each of the lessees shall be responsible for any damage or injury done by its employes (other than joint employes) to the other lessee or to the Terminal Company, or to third persons, and shall save the other lessee and the Terminal Company harmless from all loss or expense growing out of such damage or injury.

Sec. 3. In all cases of damage to the trains, property or passengers of either of the lessees, the lessee whose train or trainmen shall be at fault shall save the other lessee and
205 the Terminal Company harmless from all loss or expense growing out of such damage.

Sec. 4. In case of damages occurring to either party hereto through the joint negligence of the trainmen of both of the lessees, or through the negligence of joint employes, neither of said lessees shall have recourse against the other, but if damage or injury shall occur to the Terminal Company or to third

parties through such negligence, then the responsibility therefor and the burden thereof shall be equally divided between the lessees.

Sec. 5. In case damage or injury shall occur to the Terminal Company or to third parties by reason of the carelessness, negligence or misconduct of joint employes, the lessee owning the train, car or appliances which are the immediate cause of such damage or injury, or on which such injury or damage may occur, shall pay the cost and expense of settlement, or amount of recovery had for such damage or injury.

Sec. 6. In case of loss or damage to the Terminal Company or third persons, when the cause is unknown, the cost and expense of settlement or amount of recovery had shall be divided and paid, as expense of maintenance, in the manner hereinbefore provided for dividing and paying maintenance expenses, and in case of recovery against either party hereto by a third person for damage or injury directly caused by, or on, the trains, engines, cars or appliances of the other lessee by reason of the carelessness, negligence or misconduct of joint employes, the lessee owning such trains, engines, cars or appliances shall save harmless the other parties hereto, respectively, from all damages, costs and expenses connected with such recovery.

206 Sec. 7. In case of damage or injury to any cars, trains, engines or other appliances, or by employes, which or who, for the time being, may be employed solely in the construction, maintenance, repairs or renewals of the property, the common use of which is hereby granted to the lessee, all damages, costs and expenses connected therewith, or caused by reason hereof, shall be divided between, and paid by, the lessees as expenses of maintenance, in the manner hereinbefore provided for dividing and paying the cost of maintenance.

Sec. 8. It is hereby expressly agreed, that any other railroad company, admitted to the joint use of the property of the Terminal Company, shall assume the same liabilities and responsibilities assumed by the lessees, respectively, in the foregoing sections of this Article IV.

Article V.

Additional Mutual Covenants.

It is further mutually covenanted and agreed by and between the parties hereto, as follows:

Section 1. The rights of each of the lessees under this indenture shall depend upon the prompt payment by it of all money, and the faithful performance by it of all obligations, stipulated to be paid or performed by it. If default be made by either of the lessees in any of the payments contemplated herein, and such default shall continue for sixty days after the amount thereof shall have been determined and become payable as herein provided, the Terminal Company may, at its option, at any time while such default continues, and after thirty
207 additional days' written notice of its intention so to do, terminate the use of the demised premises by such lessee in default and exclude such lessee from the use and enjoyment of the rights and privileges herein granted.

Sec. 2. Any payment not made at the time herein fixed therefor shall bear interest at the rate of five per cent. per annum from its maturity until paid, whether the Terminal Company does or does not exercise its option to forfeit or determine the rights and privileges herein granted to the lessee so in default.

Sec. 3. All and singular the grants, agreements and stipulations hereof shall extend to and be binding upon the successors and assigns of the parties hereto, respectively, and all and singular the covenants of each of the lessees, and the conditions, provisions and stipulations in regard to the rights hereby granted to such lessee, shall extend to and be binding upon all persons and corporations who shall exercise any of the rights and privileges hereby granted to such lessee; but neither of said lessees shall sell, assign, transfer, mortgage or encumber this lease, or any of the rights and privileges hereby granted, or underlet the demised property, railroad and franchises, or any part thereof, without the written consent of the Terminal Company expressed

by unanimous resolution of its Board of Directors; and this covenant shall also apply to any unauthorized sale or transfer of this lease, or of any of said rights and privileges, or underletting of said demised premises or any part thereof, whether made by such lessee or by any proceeding at law or in equity or otherwise in which such lessee may be a party, whereby any of the rights, duties and obligations of such lessee shall, or may be, or be attempted to be transferred, encumbered, abrogated or in any manner altered without the consent of the Terminal Company had and obtained in the manner aforesaid;
208 and neither of said lessees shall have the right to contract or arrange with any other railroad or railroad company seeking an entrance into the City of New Orleans so as to give such railroad or railroad company such entrance for its trains over the railroad of the Terminal Company; but nothing herein contained shall be deemed or taken to prevent the use and enjoyment of the property, rights and privileges of the Terminal Company hereby granted to either of the lessees, by any company which shall own, control or operate any railroad of such lessee, now owned or hereafter acquired, which shall connect with the railroad of the Terminal Company directly or by means of leased lines or trackage rights; provided, that St. Louis and San Francisco Railroad Company shall and may have the right from time to time to nominate Chicago, St. Louis, Memphis and New Orleans Railroad Company, a corporation of the State of Louisiana, or any other corporation which shall, at the time of such nomination, own or control the railroad properties now owned by the Chicago and Eastern Illinois Railroad Company, a corporation of the State of Illinois, and St. Louis, Memphis and Southeastern Railroad Company, a corporation of the State of Missouri, to use the property, rights and privileges of the Terminal Company as a sub-tenant under the leasehold right by this indenture vested in said St. Louis and San Francisco Railroad Company, upon such terms as may be agreed upon between said railroad companies and said St. Louis and San Francisco Railroad Company, but no such nomination of, or sub-lease to, such company shall affect or abate the obligation of said St. Louis and San Francisco Railroad Company to the Terminal Company by this indenture assumed; provided further, that Southern Railway Company shall and may have the right from time to time,

at its option, to nominate the New Orleans and Northeastern Railroad Company, the Mobile and Ohio Railroad
209 Company and the Alabama Great Southern Railroad Company, or any one or more of them, to use the property, rights and privileges of the Terminal Company, as a subtenant or subtenants under the leasehold right by this indenture vested in said Southern Railway Company, upon such terms as may be agreed upon between said Southern Railway Company and its said subtenant or subtenants, but no such nomination of, or sublease to, any of such companies shall affect or abate the obligation of said Southern Railway Company to the Terminal Company by this indenture assumed.

Sec. 4. Nothing herein contained shall prevent the Terminal Company from assigning, for use of either of the lessees, a particular track or tracks, whether on the main line, in the passenger station or elsewhere upon the property which may be used in common, and from changing such assignment as the traffic and business over said railroad and property may from time to time require; and nothing herein contained shall prevent the Terminal Company from assigning, for use of either of the lessees and other companies, the track or tracks also assigned to and used by other companies, or a track or tracks crossed by other tracks, when from position, connection or lack of room it is proper to do so; or prevent the Terminal Company from shifting, relaying, changing or extending the tracks, or laying additional tracks, or making such improvements and additions to the same, as may become necessary.

Sec. 5. The Terminal Company shall furnish, equip and maintain suitable telegraph and telephone lines along its lines of railroad, and may place and operate instruments connected with the same in any of the stations and offices of either of the lessees where the passenger or freight business of such lessee is conducted, and where, for the movement of trains or
210 locomotives, such location may be necessary; which telegraph and telephone lines, as well as all signal stations, upon the property of the Terminal Company, shall be under the sole control and management of the Terminal Company for the purpose of operating its said lines of railroad and supervising the conducting of traffic over the same; but each of the lessees shall have the right, for use in connection with its

traffic, to place and maintain one or more wires upon the poles of the Terminal Company, and may, at such points or at such stations as may be designated by the Terminal Company, establish telegraph and telephone offices in connection with its traffic or business, but the expense of constructing and maintaining such wire or wires shall be borne by the several lessees owning the same. It is also agreed that such wire or wires, so placed or maintained by either of the lessees may be used, under license from such lessee, for commercial or public purposes.

Article VI.

Arbitration.

And it is further mutually covenanted and agreed by and between the parties hereto as follows:

That if, at any time, a difference of opinion or dispute shall arise between any two or more of the parties hereto in respect of any of the provisions of this agreement, or as to their respective rights, liabilities and duties hereunder, the question so in dispute, if it cannot be settled by the parties themselves, shall be referred to a Board of Arbitration, which shall consist of competent and disinterested persons, skilled in such matters, and shall be selected as follows; that is to say, each of the parties between whom such difference of opinion or dispute shall
211 have arisen, shall select one arbitrator, and the arbitrators thus chosen shall select an umpire to preside over such arbitration. The party desiring such arbitration shall give written notice of the same to the other party or parties, stating therein definitely the question or questions in dispute, and naming the person selected as arbitrator by the party giving such notice; and thereupon it shall become and be the duty of the other party or parties, within fifteen days after the receipt of such written notice, to name the arbitrator or arbitrators selected by such other party or parties as above provided; and in the event that it or they shall fail to do so, then the party serving such notice may select an arbitrator or arbitrators for it or them, and the arbitrators thus chosen shall select an umpire. The Board of Arbitrators, thus constituted, shall give to each of the

parties, between whom such difference of opinion or dispute shall have arisen, written notice of the time and hearing, which shall not be less than twenty nor more than thirty days after service of such notice; and at the time and place appointed, the said arbitrators shall proceed to the final hearing, unless for good cause shown, of which the arbitrators, or a majority of them, shall be the judges, such hearing shall be postponed until some later date. The determination of the Board of Arbitrators, so constituted, or a majority of them, shall be made in writing, and a report thereof delivered to each of the parties, between whom such difference of opinion or dispute shall exist, within sixty days from the date of the appointment of the umpire to be chosen by the said arbitrators, unless the parties in dispute shall agree to enlarge the time within which such report may be so rendered; and such determination, when so made, shall be final and conclusive upon the parties in dispute upon the question or questions submitted to such Board. All expenses attending each and every such arbitration shall be borne equally by the parties to the dispute so arbitrated.

212 In witness whereof, the parties hereto have executed these presents the day and year first above written.

NEW ORLEANS TERMINAL COMPANY,

By R. D. LANKFORD,

[L. S.] Vice-President.

Attest:

C. E. A.McCARTHY,

Assistant Secretary.

Signed, sealed and delivered by New Orleans Terminal Company in presence of

E. A. MILLER,

F. S. WYNN,

Attesting Witnesses.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY,

By B. F. YOAKUM,

[L. S.] President.

Attest:

T. D. HEED,

Assistant Secretary.

Signed, sealed and delivered by St. Louis and San Francisco Railroad Company in presence of

J. H. BARKER,

W. A. McAULIFFE,

Attesting Witnesses.

SOUTHERN RAILWAY COMPANY,

By S. SPENCER,

[L. S.] President.

Attest:

R. D. LANKFORD,

Secretary.

Signed, sealed and delivered by Southern Railway Company in presence of

E. A. MILLER,

F. S. WYNN,

Attesting Witnesses.

213 THE STANDARD TRUST COMPANY OF NEW YORK,

By WM. C. LANE,

[L. S.] President.

Attest:

WM. C. COX,

Secretary.

Signed, sealed and delivered by The Standard Trust Company of New York in presence of

C. M. BILLINGS,

PAUL S. O'CONNOR,

Attesting Witnesses.

214 County of New York, } ss.
State of New York, }

Be it remembered, that on this 22nd day of December, in the year of our Lord One Thousand Nine Hundred and Three, before me, George H. Corey, a Commissioner for the State of Louisiana, in and for the County of New York, in the State of New York, residing in the City of New York, and in the presence of the undersigned witnesses, both males of lawful age, personally appeared R. D. Lankford, Vice-President of the New Orleans Terminal Company, and C. E. A. McCarthy, Assistant Secretary of said Company, both being to me personally known, and known to be such Vice-President and Assistant Secretary, and being the same persons who have now executed this instrument in my presence and in that of the two witnesses whose names are hereunto subscribed as such, and the said Vice-President and Assistant Secretary being thereto duly authorized by resolutions of the Board of Directors of said Company, did thereupon declare for and on behalf of said Railroad Company that they and each of them knew the corporate seal of said Company; that the seal affixed to this instrument is the seal of such Company; that it was so affixed thereto by order of the Board of Directors by said Assistant Secretary; that they and each of them signed their names, in their respective capacities as Vice-President and Assistant Secretary of said Company, to this instrument, and that they have signed and executed the same as their own free and voluntary act and deed, and as the free and voluntary act and deed of said Company for the consideration, objects and purposes therein stated.

Thus done and signed, at the City of New York, in the State of New York, in the presence of the under-

signed Commissioner, and of E. A. Miller and F. S.
215 Wynn, both competent witnesses, both residing in said City of New York, who hereunto sign their names with said appearers, and me, said Commissioner, on the day and date aforesaid.

Given under my hand and official seal this 22nd day of December, 1903.

R. D. LANKFORD,
Vice-President.

C. E. A. McCARTHY,
Assistant Secretary.

GEO. H. COREY, [L. S.]
Commissioner for the State of Louisiana.

Witnesses:

E. A. MILLER,
F. S. WYNN.

216 State of New York, } ss.
County of New York. }

Be it remembered, that on this 18th day of December, in the year of our Lord One Thousand Nine Hundred and Three, before me, Geo. H. Corey, a Commissioner for the State of Louisiana, in and for the County of New York, in the State of New York, residing in the City of New York, and in the presence of the undersigned witnesses, both males of lawful age, personally appeared B. F. Yoakum, President of the St. Louis and San Francisco Railroad Company, and T. D. Heed, Assistant Secretary of said Company, both being to me personally known, and known to be such President and Assistant Secretary, and being the same persons who have now executed this instrument in my presence and in that of the two witnesses whose names are hereunto subscribed as such, and the said President and Assistant Secretary being thereto duly authorized by resolutions of the Board of Directors of said Company, did thereupon declare for and on behalf of said Railroad Company that they and each of them knew the corporate seal of said Company; that the seal af-

fixed to this instrument is the seal of such Company; that it was so affixed thereto by order of the Board of Directors by said Assistant Secretary; that they and each of them signed their names, in their respective capacities as President and Assistant Secretary of said Company, to this instrument, and that they have signed and executed the same as their own free and voluntary act and deed, and as the free and voluntary act and deed of said Company for the consideration, objects and purposes therein stated.

Thus done and signed, at the City of New York, in the State of New York, in the presence of the undersigned Commissioner, and of James H. Barker and William A. McAuliffe, both competent witnesses, both residing in said City of New
217 York, who hereunto sign their names with said appearers, and me, said Commissioner, on the day and date aforesaid.

Given under my hand and official seal this 18th day of December, 1903.

B. F. YOAKUM,
President.

T. D. HEED,
Assistant Secretary.

GEO. H. COREY, [L. S.]
Commissioner for the State of Louisiana.

Witnesses:

J. H. BARKER,

W. A. McAULIFFE.

218 State of New York, } ss.
County of New York, }

Be it remembered, that on this 22nd day of December, in the year of our Lord One Thousand Nine hundred and Three, before me, Geo. H. Corey, a Commissioner for the State of Louisiana, in and for the County of New York, in the State of New York, residing in the City of New York, and in the presence of

the undersigned witnesses, both males of lawful age, personally appeared Samuel Spencer, President of the Southern Railway Company, and R. D. Lankford, Secretary of said Company, both being to me personally known, and known to be such President and Secretary, and being the same persons who have now executed this instrument in my presence and in that of the two witnesses whose names are hereunto subscribed as such, and the said President and Secretary being thereto duly authorized by resolutions of the Board of Directors of said Company, did thereupon declare for and on behalf of said Railway Company that they and each of them knew the corporate seal of said Company; that the seal affixed to this instrument is the seal of such Company; that it was so affixed thereto by order of the Board of Directors by said Secretary; that they and each of them signed their names, in their respective capacities as President and Secretary of said Company, to this instrument, and that they have signed and executed the same as their own free and voluntary act and deed, and as the free and voluntary act and deed of said Company, for the consideration, objects and purposes therein stated.

Thus done and signed, at the City of New York, in the State of New York, in the presence of the undersigned Commissioner, and of E. A. Miller and F. S. Wynn, both competent witnesses, both residing in
219 said City of New York, who hereunto sign their names with said appearers, and me, said Commissioner, on the day and date aforesaid.

Given under my hand and official seal this 22nd day of December, 1903.

S. SPENCER,

President.

R. D. LANKFORD,

Secretary.

GEO. H. COREY, [L. S.]

Commissioner for the State of Louisiana.

Witnesses:

E. A. MILLER,

F. S. WYNN.

220 State of New York, }
County of New York. } ss.

Be it remembered, that on this 22nd day of December, in the year of our Lord One Thousand Nine Hundred and Three, before me, Geo. H. Corey, a Commissioner for the State of Louisiana, in and for the County of New York, in the State of New York, residing in the City of New York, and in the presence of the undersigned witnesses, both males of lawful age, personally appeared William C. Lane, President, and William C. Cox, Secretary of the Standard Trust Company of New York, a corporation domiciled in said City of New York, both being to me personally known and known to be such President and Secretary, and to be the same persons who have now executed this instrument in my presence and in that of the two witnesses whose names are hereto subscribed as such, and the said President and Secretary being thereto duly authorized by resolution of the Executive Committee of said Trust Company, did thereupon declare for and on behalf of said The Standard Trust Company of New York, that they and each of them had read and taken cognizance of the foregoing agreement, and that they had signed and executed the same for the consideration, objects and purposes therein stated, for and on behalf of said Trust Company.

And the said President and Secretary did further declare that they knew the corporate seal of said Trust Company; that the seal affixed to this instrument is such corporate seal; that it was so affixed thereto by order of the Executive Committee of such Trust Company by said Secretary; that they and each of them signed their names in their respective capacities, by like order, as President and Secretary of said Trust Com-
221 pany, and that under and by virtue of the by-laws of said Trust Company the said Secretary has the custody of the seal thereof, and is authorized to affix the seal to the instruments taken under execution of trusts which have been accepted by the said Trust Company.

Thus done and signed at the City of New York, in the State of New York, in the presence of the undersigned Commissioner and of C. M. Billings and Paul S. O'Connor, competent witnesses, both of the City of New York, who hereunto sign their

names with said appearers and me, the said Commissioner, on the day and date aforesaid.

Given under my hand and official seal this 22nd day of December, 1903.

WM. C. LANE,
President.

WM. C. COX,
Secretary.

GEO. H. COREY, [L. S.]
Commissioner for the State of Louisiana.

Witnesses:

C. M. BILLINGS,
PAUL S. O'CONNOR.

222 Memorandum of Notes of Evidence. Filed Before Master April 16th, 1909 and Filed With Master's Report in Court on January 6th., 1910.

U. S. Ciecuit [Circuit] Court,
Eastern Dist. of Louisiana.

No.

Southern Railway Co.
vs.
Ephraim Simon.

Before Hon. Chas. F. Buck, Master.

Notes of Evidence and Offerings on Behalf of Ephraim Simon, Defendant in the Above Numbered and Entitled Cause.

(1) Defendant offers in evidence under stipulation the affidavits tendered by defendant on the hearing for preliminary

injunction, and which affidavits are to be treated on this hearing as though they were depositions taken de bene esse.

(2) The record in the Civil District Court in the cause entitled Ephraim Simon vs. Southern Railway Company and the judgment in the cause.

(3) The testimony taken on this hearing of Lars Jones,

(4) The lease of the Terminal properties in the City of New Orleans from the Terminal Company to the Southern Railway Company and the Frisco Company.

(5) The bills of lading tendered before the Master issued by the Southern Railway Company for shipments of merchandise out of the City of New Orleans.

223 (6) The Check of Ephraim Simon payable to the Southern Railway Company and the indorsement on the reverse thereof showing its deposit and collection.

(7) Under stipulation, the recitals contained in the letters of Samuel A. Trufant, Secretary of the St. Charles Hotel Company, showing the lease of the premises by the Southern Railway Company and the recitals therein contained which are admitted to be the same as would have been testified to by Trufant had he been called as a witness in the cause.

(8) The letter of E. H. Rightor, Secretary of the Morris Building and Land Improvement Association, and the recitals therein contained, which are admitted to be the same as would have been testified to by Rightor had he been called as a witness in the cause.

(9) Act 74 of the Session of 1902.

(10) Act 54 of the Session of 1904 and particularly the second section of said Act wherein it is expressly provided that foreign corporations shall be subject to the process of our courts (when they "shall do any business of any nature whatever in this State, without having complied with the requirements, etc.")

(11) The Certificate from the Secretary of State showing the appointment of E. H. Farrar as the attorney in fact of the Southern Railway Company in August, 1905. The Admissions

contained in the depositions of plaintiff that the situation and operation of the Southern Railway Company was the same at the time of the rendition of the judgment as they were at the time when the power was issued to E. H. Farrar, attorney in fact, in 1905.

And such other exhibits as were offered and introduced in evidence in connection with the testimony of Lars Jones and other witnesses called on behalf of the defendant.

224 The Charter of the Terminal Company embraced in the printed record to show that it was a Louisiana corporation exercising its franchises in the Parish of Orleans, and the terminal facilities of said road and its road were leased to the Southern Railway Company and the Frisco Company.

225 Testimony for Defendant of Larz A. Jones and stipulation of counsel that all affidavits in the printed Record should be considered in evidence. Filed before the Master April 16, 1909. Filed in Court January 6, 1910.

Southern Railway Company

vs.

Ephraim Simon.

No. 13,300

In the United States Circuit Court for the Eastern District of Louisiana.

Testimony taken by consent on behalf of Defendant, before Honorable Charles F. Buck, Master, on this 7th day of January, 1909, in the above entitled and numbered cause.

Appearances:

Mr. Harry H. Hall,

Attorney for the Southern Railway Company, Complainant,

Judge Henry L. Lazarus,

Attorney for Ephraim Simon, Defendant.

Stipulation.

It is stipulated and agreed betwen counsel representing, respectively, the complainant and defendant, that all the affidavits filed in this case, and embodied in the printed record, shall be treated by both sides as if they were depositions taken de bene esse.

Mr. LARZ A. JONES, being duly sworn as a witness on behalf of Defendant, deposes and says:

Direct Examination: By Judge Lazarus.

Q. Mr. Jones, you reside in this City?

A. Yes, Sir.

Q. You are over twenty one years?

A. I am.

Q. What is your occupation?

A. I am Vice-President and Comptroller of the New Orleans & Northeastern Railroad Company, in the association line, and Auditor of the New Orleans Terminal Company.

Q. The New Orleans Terminal Company is a Louisiana corporation?

A. Yes, sir.

Q. Where is its domicile.

A. In New Orleans.

Q. Are you familiar with the affairs of the New Orleans Terminal Company?

A. I am.

Q. Are you familiar with the location of the Terminal Company's depot on Canal Street, in this city?

A. Yes, sir.

Q. I exhibit to you a photograph and identify it with your testimony as "Jones 1", and ask you if that is a fair representation of its building?

A. It is a fair representation of the Terminal Station.

Q. Do you know where the Southern Railway Company's office is in the City of New Orleans, on Common Street?

A. No, I cannot say that I do.

Q. Don't you have occasion to go in that neighborhood very often on Common Street near St. Charles?

A. Yes, I do.

227 Q. I exhibit to you a photograph showing the location of the Southern Railway passenger and ticket office at 704 Common Street, in the City of New Orleans, and ask you if that is a fair representation of the office I have described?

A. I think so.

Q. Don't you know it is?

A. I do.

Q. That is under the St. Charles Hotel in this city, is it not?

A. It is in the St. Charles Hotel Building.

Q. The St. Charles Hotel is above it and around it?

A. Yes.

Counsel for defendant offers in evidence photographs marked "Jones 1" and "Jones 2."

Q. Do you know how long that office has been maintained in the City of New Orleans by the Southern Railway Company?

A. I do.

Q. Was it here five years ago?

A. Yes.

Q. I show you a photographic view of the Terminal properties at Chalmette, and I ask you if that is a fair representation of the New Orleans Terminal Company Chalmette slips?

A. Yes.

Counsel for defendant offers in evidence photographic view of the New Orleans Terminal Company's Chalmette slips, marked "Jones 3."

Q. Are you familiar with the Terminal's tracks and yard, as shown by this blue print, described as the New Orleans Terminal Company 1905?

A. Yes.

Q. Is that a fair representation of the tracks and warehouses?

228 A. In general, yes, I could not say in detail.

Q. Have you seen this blueprint before, or one very much like it?

A. One very much like it. That is a fair representation of the property holdings of the Terminal Company in the City of New Orleans; of that portion.

Q. This does not embrace all?

A. No.

Q. There is more than this?

A. Yes.

Admission:—(Dictated by Mr. Hall):

It is admitted that the paper marked "Jones 4, indicates only portions of the tracks of the Terminal Company, as its line of railroad continues on to Chalmette, below the City of New Orleans, and connects with the belt Railroad, and cars and trains from the other roads operate on it, and are brought into the city.

Counsel for defendant offers in evidence the blueprint, marked "Jones 4."

By Judge Lazarus:

Q. Mr. Jones, are you familiar with the lease between the Terminal Company and the Frisco and Southern Railways?

A. Yes.

Q. Whom has the Southern Railway nominated to operate under that lease over the tracks of the Terminal Company?

A. The New Orleans & Northeastern Railroad, the Alabama & Great Southern, and the Mobile & Ohio Railroad Companies.

Q. What are the relations between the Mobile & Ohio and the Southern Railway Company, do you know?

A. I could not swear to the relations, except that
229 it is a matter of informal knowledge that the Southern Railway Company has an interest in the Mobile & Ohio Railroad. I could not say just what its relations are.

Q. Is there a contract between the Mobile & Ohio and the New Orleans Terminal Company for the use of its tracks?

A. Not directly.

Q. Who has that contract?

A. The Mobile & Ohio Railroad is the nominee of the Southern Railway Company; it has a direct contract with the Southern Railway Company.

Q. The Southern Railway Company is the lessee of the Terminal property?

A. Yes, sir.

Q. So the tribute which is paid for trackage by the Mobile & Ohio over the Terminal Company tracks is Paid to the Southern Railway Company?

A. I presume so. I can say more accurately if you speak of the New Orleans & Northeastern. The New Orleans & Northeastern pays direct to the Southern Railway Company, and I presume the Mobile & Ohio pays its trackage to the Southern Railway Company.

Q. Who are the nominees of the Frisco system?

A. I think recently the Colorado & Southern, and New Orleans & Pacific.

Q. So none of these roads, who are the nominees of either the Frisco, or of the Southern Railway Company, pay directly to the Terminal Company?

A. They pay directly to the lessees of the Terminal Company, and the lessees of the Terminal Company pay their lease charges to the Terminal Company.

Q. Is the contract between the New Orleans & Northeastern and the lessees of the Terminal Company in writing?

A. Not in the shape of a contract, but in the shape of correspondence.

230 Q. Have you that correspondence?

A. Not personally; not officially.

Q. Who has possession of it?

A. It is in the files of the New Orleans & Northeastern and the Southern Railway Company.

Q. And the Southern Railway Company?

A. Yes, sir.

Q. Do you know whether the contract between the Mobile & Ohio Railroad and the lessees of the Terminal Company, namely, the Frisco and the Southern Railway Company is in writing?

A. I do not.

Q. Did you ever see it?

A. I did not.

Q. As the representative of the Terminal Company, you deal only with the lessees, do you?

A. I do.

Q. And the other nominees of the lessees atorn [attorn] to their respective nominators, is that right?

A. That is right.

Q. To whom does the Frisco pay tribute for operating upon the Terminal tracks?

A. To the Terminal Company.

Q. To the Terminal Company?

A. Yes, sir.

Q. They are charged with each of the cars that are hauled over its tracks, are they?

A. Well, just at present they are not, because they are not operating in here under the contract. If they were operating in here, as originally, they would be charged on the basis of cars passing on the tracks, for the cars themselves. The nominees, as a matter of fact, have no cars.

231 Q.—They have had cars operated upon their tracks, haven't they?

A.—No.

Q.—The Southern Railway Company has never had any cars operated on the tracks of the Terminal Company?

A.—No.

Q.—You mean, none of their own cars, is that what you mean?

A.—I mean, none of their cars, or their business as the Southern Railway. The cars, and the business of their nominees have been operated over it.

Q.—And that was charged to whom?

A.—To the Southern Railway Company.

Q.—For instance, to illustrate, Mr Jones, if the trackage was a dollar per car, and the New Orleans & Northeastern ran fifty cars in a day, and the Mobile & Ohio ran fifty cars in a day, and the Alabama & Great Southern ran fifty cars in a day, the number of cars operated over the Terminal Company's tracks on that day would be one hundred and fifty cars at a dollar per car?

A.—That would not be the way in which it is handled. Let me explain: Neither the Southern Railway, nor the Mobile & Ohio, nor the Great Southern Railway Company have ever operated any cars over the Terminal road; all of the business operated over the Terminal road has been the business of the New Orleans & Northeastern, the business of the St. Louis & San Francisco, and the business of the Terminal Company.

Q.—Now, who was charged with the trackage for these respective lines, the lines themselves, or their nominators, the Southern and the Frisco?

A.—The expense of operating the Terminal property has been divided between the two lessees—the Southern, and the St. Louis & San Francisco, in the proportion of the number
232 of cars operated by the lessees, and the respective lessees and their nominees; that is, the Southern Railway has been charged with the proportion of cars operated over the Terminal for the New Orleans & Northeastern, and the Frisco for cars operated over the Terminal by the Frisco.

Q.—What about the Mobile & Ohio; don't they come in here?

A.—No.

Q:—Now, if there is a shortage in the operating of this system who pays it?

A.—There cannot be any shortage. The entire expenses are divided between the lessees on the basis of cars operated by each.

Q.—Suppose the trackage is not equal to the expenses and the fixed charges?

A.—It never is.

Q.—Who pays it then, the lessees?

A.—The two lessees.

Q.—Suppose that there was a profit arising out of the operation, and assuming they were in full operation, and doing all they could do, and there was a profit resulting from it, who would get it?

A.—The profit is an imaginary condition; but if there was a profit, it would revert to the trustees for the retirement of the securities.

Q.—And those securities are endorsed by the two lessees under the lease?

A.—They are.

Q.—So it would inure to the benefit of the two lessees?

A.—I presume that is a fair deduction. It would revert to the extinction of their obligation.

Q.—This condition of things has existed since the
233 lease was in existence, since 1903?

A.—No, The property was not operated until 1905.

Q.—But the lease was in effect in 1903?

A.—I don't think the lease was drawn in 1903.

Q.—As a matter of fact. It was, I only looked at it this morning, and even if you made a mistake the lease would speak for itself; but it is a matter of fact that it was drawn in 1903. The Terminal properties were there in 1904 and 1905?

A.—Some were, and some were being still constructed.

Q.—Improvements were still going on?

A.—Yes, sir.

Q.—But the foundations were there in 1904?

A.—Yes.

Counsel for defendant offers, introduces and files in evidence a copy of the Lease of the Terminal properties between the New Orleans Terminal Company and the Southern Railway Company, which lease is attached to the deposition of W. W. Finley, taken in this case.

Cross Examination: By Mr. Hall.

Q.—This Terminal property consists of large piles, wharves and storage facilities, at a point some five miles below the city?

A.—In part.

Q.—In part.

A.—Yes.

Q.—And also in part have railway tracks connecting these wharves with the city, and with the Terminal station in the City of New Orleans?

A.—Yes.

Q.—The Terminal Company belts down to Chalmette for completing the shipment of cars from the City of New Orleans for those who want to use those facilities?

A.—Yes, sir.

234 Q.—It is a distinct corporation by itself?

A.—Yes.

Q.—The proprietary lines of that Terminal Company are the Southern, and Frisco?

A.—Yes.

Q.—They acquired that property originally with the view of some day entering and extending their lines into the City of

New Orleans, didn't they, the Southern, and the Frisco, and developing the trade; do you know anything about that?

A.—I cannot say what was in their minds; but I can say it was so open that I will say yes.

Q.—Now, as a matter of fact, has the Southern Railway Company extended its railroad into the City of New Orleans, or operated any of its trains into the City of New Orleans?

A.—It has not.

Q.—Has the Frisco ever brought its trains into the City of New Orleans and used the Terminal facilities?

A.—Yes.

Q.—How did the Frisco bring its trains into the City of New Orleans, over what road?

A.—Over the Mobile & Ohio from Tupelo to Meridian, and over the New Orleans & Northeastern from Meridian to New Orleans, under a trackage agreement between the two companies.

Q.—That has expired?

A.—Yes; that has expired.

Q.—So that now neither the Frisco nor the Southern are operating over that road?

A.—No.

Q.—The Mobile & Ohio, and the New Orleans & Northeastern, and the Alabama & Great Southern, and the Southern Railway, are all distinct corporations?

235 A.—They are.

Q.—Absolutely distinct, one from the other?

A.—Yes.

Q.—I understood you to say, that the lessees of the Terminal Company, the Frisco and the Southern, defray all the expenses of the operation of the Terminal Company?

A.—They do.

Q.—And they receive back in part extinction of their advances of expense, such sums as are paid by the railway companies actually using the road as their nominees under the lease?

A.—Yes.

Q.—You were asked if the Terminal Company ever made a profit who would receive it. As a matter of fact, has it ever made a profit?

A.—It has not. The Terminal Company operates the property for the benefit of itself and its nominees, and its gross ex-

penses, which are always largely in excess of its receipts on its own business, are borne by the lessees.

Q.—And if the business increased largely, would, or would not the car charge, and the revenue be cut down so as to meet the expenses?

A.—It could not, because it does not receive any revenue for the cars of the lessees, and, therefore, the greater the business of the lessees, the more expenses, without any income, the Terminal Company would have from hauling their business.

Q.—These wharf facilities at Chalmette, what is the extent of them, are they very large?

A.—Are you speaking of Chalmette, or the Chalmette slips?

Q.—I mean the slip in Chalmette?

A.—Well, there are two places, Chalmette, and the slip.

Q.—Well, what is the extent of those facilities there
236 for loading foreign vessels?

A. Port Chamlette accommodates about seven ships.

Q.—It has quite a large wharf?

A.—I don't know the capacity nor the dimensions.

Q.—I mean, are the facilities there quite extensive?

A.—Yes; they are quite extensive.

Q.—And are they availed of by many railroads and many vessels?

A.—Oh, yes, they are availed of by all of the roads entering New Orleans, to a great or less extent, and by a great many vessels.

Q.—When was this Terminal station completed?

A.—The Terminal passenger station was completed and opened for business on the 1st of June, 1908.

Q.—What trains are running into it, the trains of what road?

A.—The trains of the New Orleans & Northeastern, and the trains of the New Orleans & Great Northern.

Q.—Referring to this photograph of the Southern Railway Passenger and Ticket Office, who has charge of that office?

A.—Mr Andrews is the Ticket Agent.

Q.—What are his duties?

By Judge Lazarus: If you know, now?

A.—He sells tickets over the Louisville & Nashville, and the Southern Railway.

By Mr. Hall:

Q.—A passenger buying a ticket from Mr Andrews, at this office, over the Louisville & Nashville Railroad, and over the Southern Railway, to Washington, or New York, would reach the Southern Railway at what point?

A.—Mobile, or Atlanta.

Q. Could he reach it ay [at] any point inside the State of Louisiana?

A.—No.

237 Q.—Mr Andrews is, therefore, the Ticket Agent selling the tickets of the Louisville & Nashville, and of the Southern Railway Company, but soliciting particularly for the Southern Railway Company?

A.—Yes.

Q.—Do you know by whom the tickets are furnished to him?

A.—I do not.

Re-Direct Examination: By Judge Lazarus.

Q.—Do you know who employs Mr Andrews, and who he particularly represents?

A.—He is employed by the Southern Railway Company.

Q. You speak of these four corporations as being independent corporations, that is, the Mobile & Ohio, the New Orleans & Northeastern, the Southern Railway, and the Alabama & Great Southern as being independent corporations?

A.—As distinct corporations, I think I said.

Q.—Distinct. I think that is a better word. But they have allied and common interests, have they not?

A.—Explain just what you mean by that, if you please?

Q.—Well, does not the Southern Railway Company practically control the Mobile & Ohio by its stockholding in that corporation?

A.—I don't know that I could say that I absolutely know it.

Q.—From your knowledge of the situation, and the relations of these corporations to each other, what is your belief of it?

By Mr Hall: The question is objected to, on the ground that it seeks to elicit the opinion of the witness.

By Judge Lazarus: I say that a man can testify as to his knowledge, and that I am entitled to an answer.

238 By the Master: The Master will allow the question to be answered.

A. I believe the Southern Railway Company controls the Mobile & Ohio.

By Judge Lazarus:

Q. Now, do you know what the relations between the Southern Railway Company and the New Orleans & Northeastern Railroad Company are?

A. No.

Q. The New Orleans & Northeastern Railroad Company is an independent corporation; none of its stock is owned by the Southern Railway Company, that you know of?

A. I know what the Stock Book shows.

Q. Do you know what the traffic arrangements are between the New Orleans & Northeastern, and the Southern Railway?

A. They have no traffic arrangements, other than the arrangements usually existing between independent railroad companies.

Q. You spoke of the facilities of Port Chalmette, for the accommodation of vessels?

A. Yes.

Q. And you spoke in general terms of all the roads, more or less, in the City of New Orleans using the Terminal facilities?

A. Yes.

Q. They pay trackage, do they, whenever they use those facilities?

A. Yes; all but the New Orleans & Northeastern; that is, they have to pay a lease charge. Let me correct that.

Q. For whose account?

A. For their own account.

Q. Don't they deduct what they receive?

A. They deduct the earnings from the total ex-

239 penses, and charge the lessees with the expenses.

Q. Whatever charges are collected by the Terminal Company are for the benefit of the lessees of the Terminal Company, are they not?

A. No, The Terminal Company is an independent corporation and has a franchise right to do business for itself, charging therefor, and incurring expenses. Its lease to the Southern Railway, and the St. Louis & San Francisco, is the right to use its property without, however, surrendering its independent right to do its own business, and as a condition of that lease it charges to the lessees the entire expense, less its earnings.

Q. Now then, the lease will speak for itself. All that you have stated is to be controlled by the written lease itself; but what I want to know is this, if there were no earnings at all, that is to say, if the tracks, and the warehouses, and the terminal, and the wharves were not used at all, the Frisco, and the Southern Railway would pay one-half of the expenses of the property, would they not, whatever the expenses were—your salary, for instance, and the taxes?

A. Yes; they would pay the interest and the taxes, and maintenance.

Q. Therefore, whatever is earned goes to the reduction of what they are to do, is that not a fact?

A. Yes.

Q. And the Terminal Company, under the conditions of the lease, receives five dollars a year for the lease of all of its property?

A. Yes; five dollars a year.

Q. That is the rental which the Frisco and the
240 Southern pays to the Terminal Company?

A. Yes.

Q. And the Frisco, and the Southern Railway are in the use and enjoyment of all the terminal properties under this written contract of lease, whatever that is, isn't that true?

A. All that is in operation, yes.

Re-Cross Examination: By Mr. Hall.

Q. And when you say they are in use of the road, do you mean to say that their road is in the use of the road, or its traffic?

A. No.

Q. Now how much stock of the Mobile & Ohio Railroad does the Southern Railway Company own?

A. I don't know.

Q. Do you know that it owns any?

A. I do not, except by general report.

Q. In other words, your knowledge then is confined to a rumor, and that is the foundation of your belief, that you have no personal knowledge, and no exact information on the subject?

A. No.

By Judge Lazarus

Q. Well, isn't your knowledge something more than rumor; isn't your relation to these corporations something to get in—possession of this?

A. I have no relation with either the Southern Railway Company, or the Mobile & Ohio, nor have I ever had any opportunity to know what their relations are to each other, except as anyone else has. My knowledge is gained from newspaper report and general report.

By Mr. Hall

Q. You say, your knowledge—you mean your belief?

241 A. My belief.

By Judge Lazarus:

Q. Isn't it common knowledge among the railroad people that the Mobile & Ohio, and the Southern Railway are practically one?

A. I want to be very satisfactory here in giving all the facts; but I don't know what other people's common knowledge is.

Q. Is it not generally understood among railroad men that the Mobile & Ohio is controlled, and its operations directed by the Southern Railway Company?

By Mr. Hall: The question is objected to as being absolutely leading, in spite of my protest, and irrelevant. The witness has stated that he has no knowledge of the facts.

By the Master: The Master allows the question to be answered.

A. I don't know.

By Judge Lazarus:

Q. Do you draw a salary as the Auditor of the Terminal Company?

A. Yes.

Q. That salary, in common with all salaries, is chargeable against the lessees, is it not, and paid by the lessees?

A. In part only. Portions of the property is in construction, and, therefore, construction bears a portion of the salary.

Q. And that construction is paid by the lessees, is it not?

A. No, sir: that is paid by the company.

Q. As an independent construction?

A. As independent property.

Q. That is not included in the lease, but the cost of the property is borne by the Terminal Company out of its own funds.

A. And where does it get those funds?

242 A. By the sale of bonds.

Q. And who is responsible for the bonds—the lessees?

A. The Terminal Company, first, and the lessees as endorsers.

Q. And when the construction is completed it belongs to the lessees?

A. No; it belongs to the company.

Q. But the lessees will have the use of it under its lease?

A. Yes; they will have the use of it.

Counsel for defendant offers, introduces and asks to be filed in evidence a check of Ephraim Simon on the Branch Depository of the State National Bank to the order of the Southern Railway Company, with the endorsement thereon of the Southern Railway Company, which check on its face shows that it was paid and charged to Simon's account.

By Mr. Hall: To which offer counsel for complainant reserves his right to object when the check shall be produced and exhibited.

Counsel for defendant next offers, introduces and asks to have filed in evidence a certified copy from the Secretary of State of the appointment by the Southern Railway Company of E. H. Farrar as its attorney, upon whom process may be served, as recited in the resolution and copy under Act 54 of 1904, the said power of attorney being dated the 3rd day of August, 1905.

243 Exhibit B2 Filed April 26, 1909 before Master. Filed in Court January 6, 1910, in case of Southern Railway Co. vs. Ephraim Simon. No. 13300. U. S. Circuit Court, Eastern District of Louisiana.

Dated January 2, 1908.

New Orleans Terminal Company

With

St. Louis and San Francisco Railroad Company

And

Southern Railway Company.

Supplement

To Original Joint Lease, Dated July 1, 1903.

244 An agreement, made and entered into this second day of January, 1908, by and between

New Orleans Terminal Company, a corporation organized and existing under and by virtue of the laws of the State of Louisiana, hereinafter for convenience styled the Terminal Company, party of the first part, and

St. Louis and San Francisco Railroad Company, a corporation organized and existing under and by virtue of the laws of the State of Missouri, and Southern Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Virginia, hereinafter for convenience together styled the Lessees, parties of the second part,

Witnesseth: That

Whereas, the parties hereto and The Standard Trust Company of New York did, upon or about the first day of July, 1903, make and enter into a contract styled "Original Joint Lease," bearing date on that day, whereby the Terminal Company did grant, demise and lease unto the Lessees, their successors and assigns, the equal right and privilege of using, for

the purposes of their traffic, the railroad, railway tracks, stations, appendages and terminal facilities of the Terminal Company in and about the City of New Orleans, in the State of Louisiana, for a term of ninety-nine years; and

Whereas, in and by said "Original Joint Lease" it was, in Article IV thereof, mutually covenanted and agreed as follows:

"Section 1. The Terminal Company shall not be considered in any sense an insurer at any time of the
245 safe condition of its tracks, bridges, fences or other structures forming any part of the demised premises. All officers and employees of the Terminal Company charged with the construction, operation, maintenance, repairs or renewals of the railroad and property of the Terminal Company, for the purpose of determining the liability of the respective parties hereto, in every given instance, as between said parties, shall be considered and held to be joint officers and employees of the Terminal Company and the Lessees, when engaged in duties relating to the common use and operation of said railroad and property of the Terminal Company.

"Sec. 2. Each of the Lessees shall be responsible for any damage or injury done by its employees (other than joint employees) to the other Lessee or to the Terminal Company, or to third persons, and shall save the other Lessee and the Terminal Company harmless from all loss or expense growing out of such damage or injury.

"Sec. 3. In all cases of damage to the trains, property or passengers of either of the Lessees, the Lessee whose train or trainmen shall be at fault shall save the other Lessee and the Terminal Company harmless from all loss or expense growing out of such damage.

"Sec. 4. In case of damages occurring to either party hereto through the joint negligence of the trainmen of both of the Lessees, or through the negligence of joint employees, neither of said Lessees shall have recourse against the other, but if damage or injury shall occur to the Terminal Company or to third parties through such negligence, then the responsibility therefor and the burden thereof shall be equally divided between the Lessees.

"Sec. 5. In case damage or injury shall occur to the Terminal Company or to third parties by reason of the carelessness, negligence or misconduct of joint employees, the Lessee owning the train, car or appliances which are the immediate cause of such damage or injury, or on which such injury or dam-
246 age may occur, shall pay the cost and expense of settlement, or amount of recovery had for such damage or injury.

"Sec. 6. In case of loss or damage to the Terminal Company or third persons, when the cause is unknown, the cost and expense of settlement or amount of recovery had shall be divided and paid, as expense of maintenance, in the manner hereinbefore provided for dividing and paying maintenance expenses, and in case of recovery against either party hereto by a third person for damage or injury directly caused by, or on, the trains, engines, cars or appliances of the other Lessee by reason of the carelessness, negligence or misconduct of joint employees, the Lessee owing such trains, engines, cars or appliances shall save harmless the other parties hereto, respectively, from all damages, costs and expenses connected with such recovery.

"Sec. 7. In case of damage or injury to any cars, trains, engines or other appliances, or by employees, which or who, for the time being, may be employed solely in the construction, maintenance, repairs or renewals of the property, the common use of which is hereby granted to the Lessees, all damages, costs and expenses connected therewith, or caused by reason thereof, shall be divided between, and paid by, the Lessees as expenses of maintenance, in the manner hereinbefore provided for dividing and paying the cost of maintenance.

"Sec. 8. It is hereby expressly agreed that any other railroad company, admitted to the joint use of the property of the Terminal Company, shall assume the same liabilities and responsibilities assumed by the Lessees, respectively, in the foreing sections of this Article IV.";

And

Whereas, the parties hereto desire that the provisions, hereinbefore recited, of Article IV of said "Original Joint Lease" with respect to the distribution of liability between the Ter-

minal Company and the Lessees, and between the
247 Lessees, for injuries and damages arising out of the use and operation of the property of the Terminal Company shall be modified as hereinafter provided;

Now, therefore, in consideration of the premises, it is mutually covenanted and agreed by and between the parties hereto as follows:

First. That each and every of the provisions of Article IV of said "Original Joint Lease," dated July 1, 1903, hereinbefore recited, shall be, and hereby are, abrogated and rendered of no effect from and after the date of this agreement.

Second. That all claims for loss or damage arising from or in connection with the administration, operation or maintenance of the railroad, railway tracks, stations, appendages and terminal facilities of the Terminal Company in and about the City of New Orleans, State of Louisiana, the use of which is granted to the Lessees in and by said "Original Joint Lease," dated July 1, 1903, and from the acts or omissions of any one or more of the agents or employees connected therewith, and subject to the supervision, jurisdiction and direction of the Terminal Company, and all suits based thereon which may be instituted against any of the parties hereto or any other railroad company granted the use thereof, and all claims for loss or damage to the Terminal Company or to third persons, when the cause is unknown, shall be cared for, dealt with, adjusted, defended or otherwise disposed of by the Terminal Company, and all moneys paid or payable in adjustment or settlement thereof shall be treated and considered as a part of the expenses of operation and maintenance of the Terminal Company, and shall be included in the monthly accounts which the Terminal Company is
248 required to keep and render to the Lessees, as provided in said "Original Joint Lease," and the same shall be apportioned between and paid by the Lessees as is provided in said "Original Joint Lease" with respect to other expenses of management, operation and maintenance of the Terminal Company; provided, however, that all losses and damages resulting solely from the fault of employees in the service of, or wholly from defective equipment of, either of the Lessees, or of any other party admitted to the use of said property of the Terminal

Company, without contribution to such negligence by any person who may be at the time subject solely to the jurisdiction of the Terminal Company, whether such losses and damages are sustained by any one of the parties hereto or by third persons, shall be wholly borne by that party whose employees are solely in fault, or by whose defective equipment such losses and damages are sustained, and such party shall be wholly responsible and liable for the consequences thereof. And whenever loss or damage to their property shall be sustained by the parties hereto solely through their joint negligence, then each party so jointly negligent shall bear its own loss, but loss or damage caused by such joint negligence to the public, or to any one of the parties hereto which shall not have been solely or jointly negligent, shall be borne equally by the parties so jointly negligent; and provided further, that any other railroad company admitted to the joint use of the property of the Terminal Company shall assume the same liabilities and responsibilities provided for in this section in connection with the parties to this agreement.

Third. That each and every provision of said "Original Joint Lease," dated July 1, 1903, shall continue in full force and effect in accordance with the terms thereof, except as herein specifically provided otherwise.

249 In witness whereof, the parties hereto have caused these presents to be executed, and their corporate seals to be hereunto affixed and attested by their officers thereunto duly authorized, the day and year first above written.

NEW ORLEANS TERMINAL COMPANY,

[L. S.] By

Attest:

D. D. CURRAN,
President.

IVY T. PRESTON,
Secretary.

ST. LOUIS AND SAN FRANCISCO
RAILROAD COMPANY,

[L. S.] By

Attest:

A. J. DAVIDSON,
President.

F. H. HAMILTON,
Secretary.

SOUTHERN RAILWAY COMPANY,

[L. S.] By

Attest:

W. W. FINLEY,
President.

GEO. R. ANDERSON,
Assistant Secretary.

250 Six Documents offered and filed by Defendant..... Filed before Master April 16, 1909.....Filed in Court, January 6, 1910.

No. 13,300

United States Circuit Court

Eastern District of Louisiana

Southern Railway Company

vs.

Ephraim Simon.

Dray No..... New Orleans, Mar 11 1905

Received, in good order, from E. SIMON,

Manufacturer of Ladies' Shirts, Underwear and Boys' Waists,

416 Chartres St., Between St. Louis and Conti

Southern R. R. T

Marks and Numbers	Articles
Walker & Schisolm Augusta, Ga.	(1) Case Ladies' Wear

(Stamped on Face)

RECEIVED
E. A. Bynum,
Agent
Per A. Welpt
Receiving Clerk
Mar 11 1905 5 P. M.
Loaded by .....
Date..... Time.....
Car .....

251 No. 13,300

United States Circuit Court

Eastern District of Louisiana

Southern Railway Company

vs.

Ephraim Simon.

Dray No..... New Orleans Mar 13 1905

Received, in good order, from E. SIMON,

Manufacturer of Ladies' Shirts, Underwear and Boys' Waists,

416 Chartres St., Between St. Louis and Conti

Southern R. R. T

Marks and Numbers	Articles
M. Zarks, Macon, Ga.	(1) Case Ladies' Wear

(Stamped on Face)

RECEIVED
E. A. Bynum,
Agent
Per A. Welpt
Receiving Clerk
Mar 13 1905 6 P. M.
Loaded by .....
Date..... Time.....
Car .....

252 No. 13,300

United States Circuit Court
Eastern District of Louisiana

Southern Railway Company

vs.

Ephraim Simon.

Dray No..... New Orleans, Mar 13 1905

Received, in good order, from E. SIMON,

Manufacturer of Ladies' Shirts, Underwear and Boys' Waists,
416 Chartres St., Between St. Louis and Conti

Southern R. R. T

Marks and Numbers	Articles
A. Gusdorf Selma, Ala.	(1) Case Ladies' Wear

(Stamped on Face)

RECEIVED
E. A. Bynum,
Agent
Per A. Welpt
Receiving Clerk
Mar 13 1905 6 P. M.
Loaded by .....
Date..... Time.....
Car .....

253 No. 13,300

United States Circuit Court
Eastern District of Louisiana

Southern Railway Company

vs.

Ephraim Simon.

Dray No..... New Orleans Mar 14 1905

Received, in good order, from E. SIMON,
Manufacturer of Ladies' Shirts, Underwear and Boys' Waists,
416 Chartres St., Between St. Louis and Conti
Southern R. R. T

Marks and Numbers	Articles
A. Long,	(1) Case
Selma,	Ladies'
Ala.	Wear

(Stamped on Face)

RECEIVED
E. A. Bynum,
Agent
Per A. Welpt
Receiving Clerk
Mar 14 1905 6 P. M.
Loaded by .....
Date..... Time.....
Car .....

254 No. 13,300

United States Circuit Court

Eastern District of Louisiana

Southern Railway Company

vs.

Ephraim Simon.

Dray No..... New Orleans, Mar 15 1905

Received, in good order, from E. SIMON,

Manufacturer of Ladies' Shirts, Underwear and Boys' Waists,

416 Chartres St., Between St. Louis and Conti

Southern R. R. T

Marks and Numbers	Articles
Y. M. Yaretzsky, Demopolis, Ala.	(1) Case Ladies' Wear

(Stamped on Face)

RECEIVED
E. A. Bynum,
Agent
Per A. Welpt
Receiving Clerk
Mar 15 1905 6 P. M.
Loaded by .....
Date..... Time.....
Car .....

255 No. 13,300

United States Circuit Court

Eastern District of Louisiana

Southern Railway Company

vs.

Ephraim Simon.

Dray No..... New Orleans, Mar 16 1905

Received, in good order, from E. SIMON,

Manufacturer of Ladies' Shirts, Underwear and Boys' Waists,

416 Chartres St., Between St. Louis and Conti

Southern R. R. T

Marks and Numbers	Articles
S. Rosenberg, Selma, Ala.	(1) Case Ladies' Wear

(Stamped on Face)

RECEIVED
E. A. Bynum,
Agent
Per A. Welpt
Receiving Clerk
Mar 16 1905 6 P. M.
Loaded by .....
Date..... Time.....
Car .....

256 Check offered and filed by Defendant. Filed before the Master April 16, 1909 Filed in Court January 6, 1910.

No. 13,300

United States Circuit Court Eastern District of Louisiana

Southern Railway Company

vs

Ephraim Simon

No. 4311 New Orleans, Mar. 16 1905

Branch Depository,
of the State National Bank.

Pay to the order of Southern R. R. Co. $34.00/100 Thirty-four 00/100 Dollars.

(Signed) E. SIMON.

(Stamped on Face)

Branch Depository Mar 18 1905 State Nat'l Bank, N. O.	Certified Good When Properly Endorsed payable through N. O. Clearing House $34..... Name erased: cannot be deciphered) Teller Branch Depository State Nat'l Bank

On Reverse.

Price of Ticket N. O. to Washington & N. Y. purchased from J. C. Andrews Southern Railway J. C. Andrews S. W. P. Agt.

(Stamped)

: ..... :
: La. Nat'l Bank. :
: Through :
: N. O. Clearing House :
: Mar. 17 1905 :
: R. T. :
: New Orleans, La. :
: ..... :

257 Stipulation. Filed April 26, 1909, before the Master and filed in Court January 6, 1910.

U. S. Circuit Court Eastern District of La.

No. 13,300

Southern Railway Company

vs.

E. Simon.

Stipulation.

It is stipulated and agreed between counsel representing respectively complainant and defendant, that Samuel A. Trufant, Secretary of the St. Charles Hotel Company, would, if called as a witness, testify to the facts as they are recited in his letter addressed to H. L. Lazarus, bearing date February 2, 1909, and that Edward H. Rightor, representing the Morris Building & Land Improvement Association, would, if called as a witness, testify to the facts as recited in his letter addressed to H. L.

Lazarus, dated February 3, 1909; and that said admissions are made so as to relieve the defendant from calling as witnesses said Trufant and Rightor.

The letters referred to in said admissions are attached hereto and made part hereof.

(Signed) HARRY H. HALL
Sol. for Complt.

" HENRY L. LAZARUS
Sol. for deft.

258 Morris Building & Land Improvement Co.
Hennen Building

New Orleans, February 3rd, 1909.

Mr. H. L. Lazarus,
City.

Dear Sir:—The first lease that he [we] have any record of with the Southern Railway Company, for premises No. 309 Morris Building, is a lease, of date October 1st, 1902, expiring September 30, 1903 and signed by the Southern Railway Company by J. M. Cult, Fourth Vice-President and witnessed by J. L. Grace.

(2) Lease from October 1st, 1904, to September 30th, 1905 and signed by the same party.

(3) Lease from October 1st, 1905 to September 30th, 1906 signed by the same party as Third Vice-President.

(4) Lease from October 1st, 1906 to September 30th, 1907, signed by the same party as third Vice-President.

(5) The Railway Company resorted to so much red tape about the signature of the lease for the next year that the greater part of the lease had expired before we reached anything like a conclusion. They paid that year without signing a lease.

The present lease from October 1st, 1908 to September 30, 1909, has been turned over by us to the Peoples Bank, who have just purchased the building and we do not know the signature.

Yours truly,

ER/EP (Signed) EDWARD RIGHTOR

259 St. Charles Hotel Company

Office: 405 Hennen Building

New Orleans Feby. 2nd, 1909.

Hon. H. L. Lazarus,

904 Maison Blanche Building, City.

Dear Sir:—

Reg Southern Railway.

In reply to yours of January 30th, 1909, The lease of office 704 Common Street to the Southern Railway Company dated June 23rd, 1908 is signed for the Railway By J. M. Culp, Vice President, This lease is a renewal of their lease dated July 24th, 1905.

Very truly yours,

ST. CHARLES HOTEL CO.

by (Signed) S. A. TRUFANT

Sec'ty & Treas.

P. S. The Southern Railway Co. have been lessees of this office continuously since Oct 1st 1896.

(Signed) S. A. TRUFANT

Secty & Treas.

260 Exhibit Marked Jones 5. Filed before the Master April 26, 1909. Filed in Court January 6, 1910.

United States Circuit Court Eastern District of Louisiana

No. 13,300

Southern Railway Company

vs

Ephraim Simon

Emblem of State of Louisiana

State of Louisiana,

I, the undersigned Secretary of State, of the State of Louisiana, do hereby certify that the annexed three pages, contain a true complete and full copy of the Procuration, Acknowledg-

ment of Signatures, and Copy of Resolution of the Board of Directors of the Southern Railway Company of the City of Richmond, Virginia to Mr. Edgar H. Farrar of the City of New Orleans as appears by comparing the same with the originals now on file and of record in the archives of this office.

Given under my signature, authenticated with the impress of my Seal of office, at the City of Baton Rouge, this 12th day of August A. D. 1908.

(Signed) JOHN T. MICHEL

[Seal] Secretary of State.

261 Act No. 54 of 1904.

Know All Men by These Presents: That Southern Railway Company, the principal office of which is in the city of Richmond, in the State of Virginia, being a common carrier and not having any of its line of road in the State of Louisiana, but maintaining a ticket office at No. 704 Common Street, in the City of New Orleans in the said State of Louisiana, for the sale of passenger tickets, part of which are good on the lines of this company, and maintaining a Soliciting Freight Agent, at No. 309 Morris Building in the city of New Orleans, in said State, but being advised that this does not constitute doing business by a common carrier in the State of Louisiana, but understanding that it is contended otherwise by certain of the authorities of said State, and desiring to act in conformity with the laws thereof, does hereby make this its written declaration that the place or locality of its domicile is in the city of Richmond in the State of Virginia; that it has a ticket office at No. 704 Common Street in the City of New Orleans in the State of Louisiana, for the sale of passenger tickets, part of which are good over the lines of this company in other States, and has a Soliciting Freight Agent at No. 309 Morris Building, in the said City of New Orleans, and that it does hereby make, constitute and appoint Edgar H. Farrar of the City of New Orleans, its true and lawful attorney, in and for the State of Louisiana on whom all process of law, whether mesne or final, against said company, may be served in any action or special proceedings against said

Company in the State of Louisiana, subject to and in accordance with all the provisions and statutes and laws of said State of Louisiana now in force and such other acts as may hereafter be passed amendatory thereof and supplementary thereto, and the said attorney is hereby duly authorized and empowered,
262 as the Agent of said Company, to receive and accept service of process in all cases as provided for by the laws of the State of Louisiana, and such service shall be deemed valid personal service and binding upon this Company, agreeably to Article 264 of the Constitution of Louisiana and in compliance with Act No. 54 of 1904. This appointment is to continue in force for the period of time, and in the manner provided for by the statutes of the State of Louisiana, and until another Attorney shall be duly substituted.

In Witness Whereof, the said Company in accordance with a resolution of its Board of Directors, duly passed on the third day of August, A. D. 1905, (a certified copy of which is hereto attached,) has to these presents affixed its corporate seal, and caused the same to be subscribed and attested by its President and Secretary at the City of New York in the State of New York, on the third day of August, A. D. 1905.

(Signed) S. SPENSER,
President.

(Seal)

Witness:

R. D. LAUKFORD,
Secretary.

Certified Copy of a Resolution Duly Passed by the Board of Directors of Southern Railway Company on the Third Day of August, 1905.

At a meeting of the Board of Directors of Southern Railway Company, held on the third day of August, A. D. 1905, at the office of the company in the city of New York in the State of New York, a quorum of said Board being present, on motion the following Resolution was duly passed:

263 "Resolved, That this Company, being a common carrier and not having any of its line of road in the State of Louisiana, but maintaining a ticket office at No. 704 Common Street, in the City of New Orleans in the said State of Louisiana, for the sale of passenger tickets, part of which are good on the lines of this company, and maintaining a Soliciting Freight Agent, at No. 309 Morris Building in the City of New Orleans, in said State, but being advised that this does not constitute doing business by a common carrier in the State of Louisiana, but understanding that it is contended otherwise by certain of the authorities of said State, and desiring to act in conformity with the laws thereof, hereby makes, constitutes and appoints Edgar H. Farrar, of 1114 Hibernia Bank Building, New Orleans, Louisiana, its true and lawful attorney, in and for the State of Louisiana, with the powers hereinafter set forth; and hereby authorizes the President and Secretary, under the corporate seal of the Company to file a written declaration in the office of the Secretary of State, setting forth the place or locality of the domicile of this corporation, the place or places in the State of Louisiana where it is maintaining its passenger agent and its freight soliciting agent, as aforesaid, and the name of its agent in said State upon whom process may be served, and for said purpose particularly does hereby authorize the said President and Secretary, under the corporate seal of the company, to make, constitute and appoint Edgar H. Farrar of the City of New Orleans, its true and lawful attorney in and for the State of Louisiana, on whom all process of law, whether mesne or final, against said Company may be served in any action or special proceedings against said Company in the State of Louisiana, subject to and in accordance with all the provisions and statutes and laws of said State of Louisiana now in force, and such other Acts as may hereafter be passed, amendatory thereof and supplementary thereto; and the said Attorney to be duly authorized and empowered, as the agent of said Company, to receive and accept service of process, in all cases as provided for by the laws of the State of Louisiana, and such service to be deemed valid personal service and binding upon this Company, agreeably to Article 264 of the Constitution of Louisiana, and in compliance with Act 54 of 1904. Said appointment is to continue in force for the period of time, and in the manner

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provided for by the statutes of the State of Louisiana, and until another Attorney shall be duly and regularly substituted.

I hereby certify that the above is a correct copy of the vote or Resolution of the Directors of said Company, authorizing the appointment of an attorney for the State of Louisiana.

Witness my hand and seal of said Southern Railway Company, at the City of New York in the State of New York this third day of August, 1905.

(Signed) R. D. LAUKFORD,
Secretary.

(Seal)

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264 State of New York,)
County of New York) SS.
City of New York.)

On this 3rd day of August, 1905, before me, the subscriber, duly appointed to take proof and acknowledgment of deeds and other instruments, came S. SPENCER, President, and R. D. LAUKFORD, Secretary, of the Southern Railway Company, to me personally known to be the individuals described in and who executed the preceding instrument, and they each duly acknowledged to me, and in the presence of the subscribing witnesses, the execution of the same; and being by me each duly sworn severally and each for himself deposeth and saith that they are the officers of the Company aforesaid, and that the seal affixed to the preceding instrument is the corporate seal of the said Company; and that the said corporate seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and direction of said corporation.

In testimony whereof, I hereunto set my hand and affix my official seal, at the City of New York the day and year first above written.

(Signed) CHARLES E. A. McCARTHY,
Notary Public Kings Co., N. Y. (32)

[Seal]

Certificate filed in New York Co.
Commission expires Mch. 30, 1907.

265 Exceptions of Complainant to Master's Report.

Filed before the Master November 15th, 1908.

Filed in Court January 6th, 1910.

U. S. Circuit Court, Eastern District of La. New Orleans Division.

No. 13300

Southern Railway Company

vs

Ephraim Simon

Complainants Exception to the Master's Report.

Comes now the Southern Railway Company which excepts to the Master's Report herein, in so far as the Master finds and reports that the charges of fraud and bad faith averred and indicated by the evidence submitted are not sufficient to justify the annulment of the judgment in the State tribunal.

Wherefore, his appearer respectfully prays that this exception be maintained and for all general and equitable relief.

N. O. Nov. 17th. 1909

(Signed) HALL & MONROE
Sol. for Complt.

266 Stipulation Agreeing on Time Within Which to File Exceptions to Master's Report.

Filed Before the Master June 26th., 1909.

No. 13,300

In the United States Circuit Court for the Eastern District of Louisiana

Southern Railway Co.

vs

Ephraim Simon

Before the Honorable Charles F. Buck, Master.

Upon the reading of the reports submitted to the undersigned counsel, representing the plaintiff and defendant, it is

stipulated that either party shall have until the first Monday in November, to take and submit such exceptions to the Master's reports as they may deem advisable. And, the Master shall, thereafter, assign a day for the hearing of said exceptions.

The stipulation is in consequence of the intended absence of the Master, and who will not be able to give consideration to the matter, until his return to the City, at or about the time stipulated herein, for the filing of the exceptions.

(Signed) HENRY L. LAZARUS

Sol. for deft.

(Signed) HALL & MONROE

Sol. for Complt.

267 Rule to Vacate Order.

Filed February 4, 1910.

No. 13,300

United States Circuit Court, Eastern District of Louisiana, New Orleans Division.

Southern Railway Company

vs

Ephraim Simon,

Rule to Vacate Order.

Now comes Ephraim Simon, defendant in the above numbered and entitled cause, and moves that the order entered on the court's own motion, on the 10th day of June, 1905, referring this cause to the Master, with instructions to "hear and take all testimony and evidence in this cause and to report the same to this Court, together with his findings of law and fact, together on

any and all matters which may come before him in this cause", was an order unauthorized in law and invested the Master with power to hear and determine this cause, in the absence of a stipulated consent of record between the parties to said cause and is wholly unauthorized, illegal, null and void; and, that the action of the Master, under the instructions of the court hereinbefore complained of, and his report thereunder to this court of his findings of fact and of law for the court's action, is wholly unauthorized, illegal, null and void, and the said order of June 10th, 1905 should be so declared, and annulled, vacated and set aside; and, that the report of the Master, under said order, should be stricken from the files of the court and returned to said Master with instructions, in accordance with law, to only report the evidence administered before him, oral and documentary, without any further reference thereto than a note thereof so as to identify the evidence administered before him, and said note of evidence shall be without any findings of either fact or law upon the evidence so administered.

It is ordered, that plaintiff show cause on a day to be hereafter fixed by the court, why the ex proprio motu order
268 of the court, of June 10th, 1905, should not be declared to have been improvidently and unwarrantedly entered, and why the same should not be declared and decreed as ineffective and inoperative, being in violation of law and the rights of the litigants to this cause, and why the Master's report filed in this court on January 6th, 1910, under the order hereinbefore referred to should not be stricken from the court's files and returned to said Master with instructions, in accordance with law, to certify to this court the evidence, administered in the cause, oral and documentary, without any comment on the evidence or findings either of fact or of law, and with a further direction to said Master, to certify only to this court, in accordance with law and the rights of the parties to this cause, the evidence oral and documentary administered before him.

(Signed) HENRY L. LAZARUS
Sol. for deft

N. O. Feby 4/10

269 Exceptions to Master's Report. Filed February 4th, 1910.

United States Circuit Court,

Eastern District of Louisiana,

New Orleans Division.

No. 13,300.

Southern Railway Company,

vs

Ephraim Simon.

Exceptions to Master's Report

And, now, comes Ephraim Simon, and with full reservation of his rights, in the event of an adverse ruling by the court to vacate and set aside its order of June 10th, 1905, as fully set out in his said motion, appearer, in order to save time and spedd [speed] the cause, here excepts to the Master's report, and to each and every finding of fact and law announced and found by the Master in this cause, acting under the order hereinbefore complained of.

And this defendant, taking cognizance of the final draft of the Master's report and its lodgment in this court on January 6th, 1910, as appears by the entry in the Chancery Order book, files herewith his exceptions to said report, and renews and pleads the exceptions presented to the Master on the submission of the draft on his report to this appearer, which exceptions were overruled and were, with the said Master's report, returned unto this Honorable Court.

And, this appearer further says: That he here specially and expressly renews, to the final draft of the Master's report and submits to the court, the exceptions filed before the Master, and which exceptions set out in detail, the objections to the specific findings of fact and of law prejudicial to the rights and interests of this appearer, and which exceptions are annexed here-

to and made part hereof and are to be considered as though set out herein in extenso, and, your appearer urges and pleads with the reservation contained herein (with reference to the order upon which said report was made) all of his objections embodied in the exceptions tendered and submitted to the Master and which are made part hereof.

270 Wherefore, the premises considered, this appearer prays that the Master's report and his findings of fact and law be rejected, and the said report stricken from the files and returned to the Master with directions to transmit and certify to this court, the evidence oral and documentary administered in the cause, or, in the alternative, that the exceptions herein interposed to the Master's report be, in all respects, maintained and the said report made to conform therewith, and that thereupon, there be judgment pronounced by this court on the facts and the law, in accordance with the true facts proved in the cause and the law governing its disposition, all of which is prayed for by this appearer in his answer in this cause, and, appearer prays for all further and necessary orders, for general and equitable relief.

(Signed) HENRY L. LAZARUS,
Sol. for deft.

(Signed) ELDON S. LAZARUS
" H. MICHEL
" D. SESSLER
Of Counsel

N. O. Feby 4/10

271 United States Circuit Court,
Eastern District of Louisiana
New Orleans Division.

13300.

Southern Railway Company,
vs
Ephraim Simon.

Exceptions to the Master's Report.

Comes now the defendant, Ephraim Simon, who having been served by the Master with a draft of his report, which ap-

pearer is advised is to be submitted to the court for its action, and which report was drafted by the Master under the reference made by the court, entered on June 10th, 1905, which order of reference was made and entered, before issue joined,—upon the court's own motion, without application therefor of either the complainant or defendant and to which order of reference this defendant at no time assented, but on the contrary did, to the Judge then presiding, object at the time of the entry of said order.

Now appearer formally and expressly renews and urges here the objection—that it was beyond the power or jurisdictional competency of the said Judge of the Circuit Court to make the reference aforesaid, in said cause, as directed by his order, and that the powers of the Master to be exercised herein, under the reference aforesaid are, and should be, limited in accordance with law; that the Master's functions under the law are limited to the transmission to the court of the evidence oral and documentary and the proof administered in his presence, without comment thereon or without announcement by the Master of his appreciation either of the evidence or of the law that is to govern and control the disposition of the issues formulated by the pleadings in this cause, and that any report beyond the return
of the testimony, as aforesaid, is a voluntary opinion
272 of the Master which, under the law, the court cannot and should not consider in determining the rights of the respective parties to this litigation.

This appearer therefore, now formally and expressly objects and excepts to the entire report as drafted and submitted, as embodying the opinion of the Master, who is without right or authority, under the law, to submit his opinion in this cause to the court in charge of the litigation, without the consent of the parties to said litigation. That such consent, if given, must be made to appear by stipulation of record so as to invest the Court with authority, under the law, to refer the issues of fact and of law to a Master and thus yield and surrender its power and jurisdiction to that of an agency created independently of the will or without the consent of the parties to the litigation, and this exception here reserved, unless sustained by the master by the withdrawal of the draft of the report served upon your ap-

pearer, will be renewed and is to be treated as though filed in court to the report served upon this defendant, if such report is submitted for the court's action in the pending litigation.

And now, the defendant insisting upon the objection made to the assumed power of the court and its exercise by the Master, in the finding of the facts and the law, to govern the disposition of the pending cause, and defendant reserving his full rights in the event that said objection and exception should not be sustained by the Master, to again urge the same before the court on the hearing of the exceptions to the Master's report, this defendant without prejudice to his rights, as aforesaid, excepts to the Master's report in the respects hereinafter detailed, so as to afford an opportunity to said Master to correct the report as drafted, so as to have it conform to the facts as disclosed by the evidence as administered before him.

Defendant excepts to the report of the Master, primarily on the ground that in drafting said report the Master has
273 failed to observe the equity rules and the practice of the Chancery Court, in not indicating and specifically referring to the depositions and documentary proof upon which his findings of fact are based.

Defendant excepts generally to the findings made by the Master, inasmuch as they are without support in the evidence in the cause and that the evidence and the weight of the evidence establish that the Southern Railway Company was, at the time of service of process in the cause of Ephraim Simon vs. Southern Railway Company, doing business in the City of New Orleans, State of Louisiana and was, in consequence thereof, subject to the jurisdiction of the courts of the State of Louisiana.

Defendant expressly objects to so much of the Master's report as interjects into the case, questions of fact and law, not raised by the pleadings in the cause, nor by the evidence, and more particularly:—

(a). The question of the validity of the service of the process on the Assistant Secretary of State, in the absence of the Secretary of State, the said Master's report making it perfectly manifest that an opinion had been reached by the Master before a through [thorough] examination of the law governing the case, the Master's report itself destroying the contention advanced by the Master, although an attempt is made to restrict

the operation of the statute which directs that— "In the absence of the Secretary of State, the Assistant Secretary of State is fully authorized to perform all or any of the duties or official acts required by law of the Secretary of State, during the sickness or absence, for any cause, of the latter."

(b). The discussion by the Master, as to the locus in quo of the breach of contract was not called for by any issue presented by the pleadings in the cause, and evidence was not administered as to where the contract was entered into and the ques-
274 tion of where the contract was breached only arose incidentally in the trial of the cause; that fact and the discussion by the Master of an abstract legal principle, concludes his review of the law by expressing a doubt as to the correctness of the authorities which he quotes to support his argument.

The uncalled for discussion of these two questions by the Master, tends to cloud and confuse the real issues in the cause.

Defendant excepts to the findings of fact embodied in the Master's report and to make the said exceptions more specific, refers particularly to the findings as made by the Master and which are at variance with the evidence administered in the cause or which are without support in the evidence.

In the Master's report, under the heading "Findings of Fact," the Master instead of returning the evidence undertakes to find facts, to which exception has already been made and on the question of jurisdiction found:

That the Southern Railway Company did not "own tracks and operate any trains for freight or passenger transportation" in the State of Louisiana. By the lease in evidence it is shown that the Southern Railway Company has a lease of the Terminal Property in the Parish of Orleans and was in the use and enjoyment of said properties and that the same were being operated for its benefit, with a power invested in the Southern Railway Company to sub-lease the said Terminal properties of which it is in part the lessee, to any other Railway Company, provided its co-lessee approved the same and for the sub-lease of said Terminal properties held by the Southern Railway Company, under lease, the revenue derived therefrom was applied in part

to the lease rent due by the Southern Railway Company to the Terminal Company; and that, as is shown by the testimony, the Southern Railway Company sub-leased direct to the
275 New Orleans & North-eastern Railway Co., the properties of the Terminal Company and the right to use its tracks and received directly from the New Orleans & North-eastern Railway Company a revenue therefor, the amount of which is not disclosed by the evidence.

That in the leasing by the Southern Railway Company, of the Terminal Company's properties in the City of New Orleans and the Parishes adjacent thereto, the Southern Railway Company is in the use and enjoyment of said property, operated through the agencies of the Southern Railway Company. That under the facts and the law, the Southern Railway Company is doing business in the State of Louisiana and in consequence thereof is subject to the jurisdiction to [of] the courts of the State of Louisiana.

That the right to lease Railroad properties and franchises in this State is conferred by act 74 of 1902, of the General Assembly of Louisiana, without which a lease of Railroad properties could not be effected, and that the lease between the Terminal Company and the Southern Railway Company (in evidence in this case), was entered into under the law as it then existed and the provisions of said law require that the lessees should maintain a domicile in the Parish where the leased road was operated, and upon its default in the selection of an agent to represent it at that domicile, the State selected as a representative of said corporation, the Secretary of State, who was designated by the State as the agent provided for in Act 54 of 1904, and upon whom the service of legal process should be made, subjecting the lessees of railroad properties in this State to the jurisdiction of the courts of this State.

That the statements in paragraphs 2, 3, 4, and 5 of the Master's finding are not warranted by the testimony administered before the Master, principally the statement in the fourth paragraph of finding, "that said Ticket Agent, J. C. Andrews, had no connection with the Southern Railway Company, except
276 as incidentally results from the sale of tickets". This finding by the Master is taken from the ex parte affidavit of J. C. Andrews, which is false in point of fact, as is made

manifest by the sworn deposition of W. W. Finley, President of the Southern Railway Company, who says: that "Andrews is in the employment of the Southern Railway Company and is paid by it, and the Southern Railway Company pays the rent for the office occupied by him." It is also true, as shown by the deposition of W. W. Finley, President of the Southern Railway Company, that James B. Graham, Soliciting Freight Agent is also employed and paid by the Southern Railway Company, and that the said Graham also maintains offices in the city of New Orleans, the rent for which is paid by the Southern Railway Company, and it is also shown that the Southern Railway Company, through its executive officers have under lease the offices occupied by said Andrews and Graham, and used exclusively for the business of the Southern Railway Company. By the evidence in the record it is further shown that said leases were in operation years before and years after the cause of action of said Ephraim Simon arose, and were in effect at the time of service of process in this cause upon the Southern Railway Company, through its agent, the Secretary of State of the State of Louisiana. Larz A. Jones, an officer of the New Orleans & North-eastern Ry. Co., and the Auditor of the New Orleans Terminal Company states that "Andrews is employed by the Southern Railway Company."

The finding by the Master, that "The record does not seem to disclose what business, if any, was transacted in this office," referring to the Freight Solicitor's office of the Southern Railway Company, in the City of New Orleans, is not warranted by the evidence. The fact is admitted with reference to the lease from the Morris Building to the Southern Railway Co. that it was entered into by the Southern Railway Company by J. M. Culp, Fourth-Vice President of the Southern Railway Company,
277 for the use of the Railway Company and where its business was transacted and that the occupancy by the Southern Railway Company, of the said premises was for its business as a Railway Company, as shown by the deposition of W. W. Finley. The same is true as to the lease by the Southern Railway Company, of the premises occupied by Andrews, the ticket agent of the Southern Railway Company, the rent for which it is admitted was also paid for by the Southern Railway Company.

These facts are additionally strengthened and supported by the affidavit of Ephraim Simon, who states that he has transacted business with Andrews and Graham, in this City, purchasing tickets and shipping freight over the Southern Railway.

To the eighth finding by the Master, exception is taken on the ground that while the Terminal Company owns and operates the Terminal facilities, the omission to find the controlling fact that the operation is for the benefit of the lessees, under their lease, gives to the eighth finding a force and meaning which is not justified by the evidence in the record.

To the tenth finding, that the affairs of the Terminal Company are managed by its own officers is misleading in this, that the record shows that the officers in charge of the Terminal Company's operation, under the lease to the Southern Railway Co., and the St. Louis & San Francisco Railway Company, are officers selected by the lessees of the Southern Railway Company and the St. Louis & San Francisco Ry. Co. and are subject to their control and direction; that the operation of the Terminal Company's properties is nominally the operation of the Terminal Company, but in point of fact and truth, as shown by the record, the operation of the Terminal Company's properties is under the control and direction of the Southern Railway Company and its co-lessee.

The thirteenth finding, that the Terminal properties were constructed "with means procured by a bond issue" is not warranted by the evidence. The bond issue was only to en-
278 large the properties that had been previously acquired by the Southern Railway Company and the St. Louis & San Francisco Ry. Co., The capital stock of the Terminal Company was $2,000,000.00 and after issue was divided equally between the Southern Railway Company and St. Louis & San Francisco Ry. Co. Then a lease of the Terminal properties was effected at the nominal rental of $5.00 per annum with a right reserved to said lessees to sub-lease the Terminal Facilities of said leased property to any other railroad company, subject to the approval of the joint lessees.

The sixteenth finding is excepted to as not being an accurate statement of the contract of lease between the Terminal Company and the lessees. The conditions of said lease, coupled with the limitation of liability upon the lessees respectively, for in-

juries in operating the Terminal properties, show conclusively that while the lessees have the benefit and advantage of the lease, the Terminal Company nominally operate the system, its officers being selected by the lessees, it is the lessees which under the Terminal's lease derive all of the benefits and advantages resulting from the operation of the system, with a right, under the lease, to enlarge and improve the same for their benefit and advantage, the Terminal Company being simply the agency through which the lessees conduct their business.

To the nineteenth finding, that "The Southern Railway Company has never had any cars operated on the tracks of the Terminal Company", exception is taken on the ground that the finding is without support in the sense in which the finding is made, the evidence discloses that the Southern Railway Company's cars have been operated on the tracks of the Terminal Company, under the direction of the New Orleans & Northeastern Ry. Co., the Mobile & Ohio Railway Company and other companies, who are the sub-lessees of the Terminal Company facilities, they being sub-lessees of the Southern Railway Company, the lessee of the Terminal Company.

279 To the twentieth finding by the Master, exception is taken on the ground that it is not true in point of fact, that the terminal facilities of the Terminal Company "are manifestly used and intended to be used by any or all railroad companies entering this city, for switching and terminal purposes." The evidence in the record shows that the object and purpose of the Southern Railway Company, in purchasing one-half of the capital stock of the Terminal Company and in leasing from the Terminal Company the terminal properties, was to enable the Southern Railway Company to use said terminals and have it form and constitute a part of its system as a connecting road, with those owned or leased by the Southern Railway Company, and that under the evidence in the record, no road entering New Orleans has any right to the use of the said Terminal properties, except they be nominated by the Southern Railway Company, to its co-lessee the St. Louis & San Francisco Ry. Co., or nominated by the St. Louis & San Francisco Railway Company to the Southern Railway Company and accepted by it, and that for the privilege of operating upon said terminals the nominees of either of the lessees account for or attorn to the said respect-

ive roads, for the charges in operating upon the said Terminal Railway System and that the revenues from said nominees are the earnings and property of the said lessees.

To the twenty-first finding exception is taken to the Master's report, in finding that the earnings of the lessees were limited to the specific purpose of being applied to the ultimate redemption of the Terminal Company's bonds, whereas the testimony shows that all earnings over and above the operating expenses and the lease charges inure to the benefit of the lessees during the period of the lease.

Exception is taken to the twenty-third finding, that the freight receipts offered in evidence establish "no definite fact."

280 The fact is shown on the face of the freight receipts. is that they were issued by the representative of the Southern Railway Company in the City of New Orleans, for shipments of merchandise from the City of New Orleans, over the lines of the Southern Railway Company, and that the Southern Railway Company was, at the time, doing business in the City of New Orleans.

11.

Defendant excepts to the report of the Master, to his filing as a matter of law, that the Southern Railway Company was not doing business in the City of New Orleans, State of Louisiana in December, 1904, and was therefore not subject to the jurisdiction of the courts of the State of Louisiana, by service upon the Secretary of State.

Defendant excepts to the report of the Master, to his finding as a matter of law, that the Assistant Secretary of State was not authorized under the statutory laws of the State of Louisiana to act for the Secretary of State in the absence of the Secretary of State.

Defendant excepts to the report of the Master, to his finding as a matter of law, that the plaintiff was without right to assert and maintain in the courts of Louisiana, his cause of action, the courts of Louisiana having jurisdiction of all of the causes of action, whether transitory or not, under contract or in tort, no matter where said cause of action arose; that this finding was

interejcted into the report of the Master and is without support under the pleadings or the evidence in the cause.

Defendant excepts to the report of the Master, to his finding as a matter of law, that the issuable fact as presented in the pleadings in the State Court, to-wit:—that the Southern Railway Company, at the time the action was instituted was
281 doing business in the City of New Orleans, State of Louisiana and was, in consequence thereof, subject to the jurisdiction of the courts of the State of Louisiana, was a fact determined by the jury empaneled to try the cause, and by the judge who, upon the verdict of the jury entered his judgment and that fact cannot be reviewed by the United States Circuit Court or by the Master to whom the reference was made; that if the fact is at all reviewable it is by the Supreme Court of the State of Louisiana, and thence by writ of error to the Supreme Court of the United States.

Defendant excepts to the report of the Master, in his failure to find, as a matter of law, under the order of reference, that the proceedings here are to enjoin "a suit and judgment" of the State Court and that under the law of comity and the provision embodied in section 720 of the U. S. Revised Statutes an absolute prohibition is laid upon the Federal Court from enjoining proceedings in a State Court and that no other relief is sought in the pending suit of the Southern Railway against Ephraim Simon.

Wherefore, the premises considered, this appearer respectfully prays that the exceptions herein be maintained and that thereupon the Master withhold and withdraw his report, the same being without authority and warrant in law, or in the alternative that the particular exceptions to the findings of the Master, both of fact and of law, be maintained and the report redrafted accordingly. And, appearer further prays that in the event the Master submits to the court his report as framed, that he transmit to the court for its consideration, all of the testimony, oral and documentary, and all of the exhibits submitted to the Master by the plaintiff and defendant, and that in accordance with the equity rules and practice, that he make a list of the depositions, documents and exhibits filed before him and transmit the same to the United States Circuit Court for its consideration and further action in the premises.

282 And, this appearer prays that he may have the benefit and advantages that may be had or taken to the many errors contained in the Master's report, a draft of which has been submitted to this appearer and his solicitors and to which exceptions have been taken and reserved, and for general and equitable relief.

283 Notice of Filing Exceptions.

Extract From the Chancery Order Book.

Friday, February 4, 1910.

Southern Railway Company

vs No. 13300

Ephraim Simon

Now comes Ephraim Simon, through his Solicitor Henry L. Lazarus, and with full reservation of the order applied for, to vacate the order of reference of June 10th, 1905, and to speed the cause, files his exceptions to the report of the Master filed herein on January 6th., 1910.

284 Motion to Set for Hearing Exception to Master's Report.

Filed March 4th., 1910.

United States Circuit Court

No. 13300

Southern Railway Company

vs

Ephraim Simon.

On motion of Hall, Monroe and Lemann, Solicitors for complainant It is ordered that Defendant's exception to the Master's

Report and his motion to set aside the same, be placed upon the docket for hearing and that they be heard on Saturday the 12th day of March 1910 at 11 A. M.

285 Order Continuing Exceptions to Master's Report.

Extract From the Minutes.

New Orleans, Saturday, March 12, 1910.

Court met pursuant to adjournment.

Present: Hon. Rufus E. Foster, District Judge

Southern Railway Co.

No. 13300 vs

Ephraim Simon

On motion of Hall, Monroe & Lemann, Counsel for Plaintiff, and on suggesting the absence of Counsel for Defendant;

It is ordered that the Exceptions to the Master's Report and Rule to set aside the same, herein fixed for hearing this day, be continued indefinitely.

286 Motion to Set for Hearing.

Filed May 18th, 1910.

U. S. Circuit Court

No. 13300

In Equity.

Southern Railway Co.

vs

Ephraim Simon.

On motion of Hall, Monroe & Lemann, Solicitors for complainant, It is ordered that the exception to the Master's report

herein, be set for hearing for Saturday, May 28th 1910 at 11 A. M.

N. O. March 1910

287 Order Continuing Exceptions to Master's Report.

Extract From the Minutes.

New Orleans, Saturday, May, 28, 1910.

Court met pursuant to adjournment.

Present: Hon. Rufus E. Foster, District Judge.

Southern Railway Co.

vs No. 13300

Ephraim Simon

By agreement of Counsel for the respective parties;

It is ordered by the Court that the Exceptions to the Master's Report herein, fixed for hearing this day, be continued until June 14th., 1910, at 11 o'clock A. M.

288 Hearing on Exceptions to Master's Report and Submission.

Extract From the Minutes.

New Orleans, Tuesday, June 14, 1910.

Court met pursuant to adjournment.

Present, Hon. Rufus E. Foster, District Judge.

Southern Railway Company

vs No. 13300

Ephraim Simon

This cause came on this day to be heard upon the motion to set aside the order of reference to the Master of June 10th.,

1905, and also upon the Exceptions to the Master's Report filed herein by the defendant;

Present: H. L. Lazarus, of Counsel for Mover and Defendant.

" Harry H. Hall, of Counsel for Complainant.

And was argued by the Counsel for the respective parties and submitted—when the Court took time to consider.

289 OPINION OF COURT..... Filed November 25, 1910.

No. 13300.

United States Circuit Court.

Eastern District of Louisiana.

Southern Railway Company

vs.

Ephraim Simon.

In this case complainant the Southern Railway Company seeks an injunction to restrain the defendant, Ephraim Simon from executing a certain judgment of the Civil District Court for the Parish of Orleans, on the ground that said judgment is null and void for want of citation. A demurrer attacking the jurisdiction of this Court to issue the injunction was overruled by my predecessor, the Hon. Charles Parlange, and the jurisdiction of this Court was also maintained by my predecessor, the Hon. Eugene D. Saunders. See also Ex parte Simon 208 U. S. 144.

From a careful consideration of the law as I understand it I agree with them and cannot add to the reasons they assign.

The defendant, Ephraim Simon, was injured while a passenger on one of complainant's trains, in Alabama. Thereafter he

filed suit against complainant in the Civil District Court for the Parish of Orleans, Louisiana, alleging complainant to be a foreign corporation doing business in the State of Louisiana; that it had not appointed an agent to receive service of citation, and therefore service should be made upon the Secretary of State, in accordance with the law of Louisiana, Act No. 54, of 1904.

Judgment was obtained in his favor and against the Southern Railway Company in the sum of thirteen thousand three hundred and forty eight dollars ($13,348.) After this judgment had become final, complainant filed its bill in this Court alleging the service upon the Secretary of State to be null and void, and the judgment against it rendered without due process of law, in vioaltion of the Constitution of the United States; that the demand of complainant in said suit was unconscionable and was obtained by fraudulent and false testimony; that the claim consisted in part of remote and consequential damages not recoverable; that complainant had no knowledge of the pen-
290 dency of the proceedings until after the rendition of the judgment, and that it had a good and valid defense to the action.

Issue was finally joined and the matter was referred to a master, who in due course filed his report.

The defendant has excepted to the master's report as a whole, and specially, both as to his conclusion of law and the findings of fact. It is contended by complainant that defendant, by not having objected to the taking of the evidence before the Master, has consented to his appointment, and is now estopped to controvert his findings of fact. I do not agree with this contention. The Court could not, except by consent of all parties, abdicate its duty to determine, by its own judgment, the facts and the law applicable to them. The report of the master is merely advisory to the Court, and while entitled to great weight on findings of fact deduced from conflicting testimony, where the master has had opportunity to form his own opinion as to the truthfulness of the witnesses, the Court may weigh the evidence and find its own facts, and indeed it is the Court's duty to do so whenever either side excepts to the report of the master. In this case I consider the entire matter is before me for decision.

It is evident that the first question to be considered is that of citation. Act No. 54, of 1904 relied upon by the defendant Ephraim Simon is as follows:——

"Section 1—Be it enacted by the General Assembly of the State of Louisiana, That it shall be the duty of every foreign corporation doing any business in this State to file in the office of the Secretary of State a written declaration setting forth and containing the place or locality of its domicile, the place or places in the State where it is doing business, and the name of its agent or agents or other officer in this State upon whom process may be served.

Section 2—Bt it further enacted, etc., That whenever any such corporation shall do any business of any nature in this State without having complied with the requirements of Section 1 (one) of this act, it may be sued for any legal cause of action in any parish of the State where it may do business, and such service of process in such suit may be made upon the Secretary of State the same and with the same validity as if such corporation had been personally served."

Undoubtedly the State of Louisiana has the right to require foreign corporations doing business within its borders to appoint an agent upon whom service of legal process can be made. In default of the appointment of such an agent, the State
291 can appoint one for the corporation, or reuire service to [be] made upon some designated State official, provided such service shall constitute due process of law. Insurance Association vs. Phelps, 190, U. S. 147. Petroleum Co. vs. West Virginia, 203 U. S. 183. What is, or is not due process of law must depend upon the facts in each case and the Supreme Court of the United States has carefully refrained from laying down any general rule. But it is fundamental that the method of citation should be fairly calculated to bring home to the defendant actual notice of the pendency of the action, and allow him a reasonable time to put in his defense. Roller vs. Holly 176, U. S. 398. Davidson vs. New Orleans 96 U. S. 97.

In the case first above cited the State of Kentucky required Insurance Companies doing business in the State to consent that service of process be had upon the Commissioner of Insurance, but the statute further required the Commissioner to give the

corporation actual notice by mail. In the second case, the State of West Virginia required foreign corporations to appoint the State Auditor attorney in fact to accept service of process, but also made it his duty to transmit the process or notice by registered mail to the corporation.

It will be observed that the statute of Louisiana imposes no duty whatever upon the Secretary of State regarding his representing a foreign company. He is not made its agent in any way; he is not required to appear for it in a suit wherein he is served; nor is he even required to notify the corporation of the pendency of the action.

The evidence in this case shows, and it is not disputed, that the complainant had no actual notice of the pendency of the action in the State Court until after the final judgment. By advice of the Attorney General of the State of Louisiana, the Secretary of State merely filed the process and made no effort to notify the complainant. The Supreme Court of Louisiana in Gouner vs. Mississippi Valley Bridge & Iron Co. 123 La. page 964, in considering Act No. 54 of 1904 held a service upon the Secretary of State to be null and void. In the course of
292 his opinion the Chief Justice took occasion to say;—

"There is a feature in the law last cited that is peculiar, and adds something in its illegality when it is proposed to maintain a service, as in this case. As applying exclusively to foreign corporations absent from the State, within the extreme meaning of the word "absentee," we will state: This law makes no provision whatever for the service on the defendant. The officer may decline to communicate with the person sued and give no notice whatever; not even by mail. A judgment might be obtained without the least knowledge of the person sued. Under the phrasing of the statute, the duty of the officer begins and ends in his office. If such a judgment were rendered it could receive no recognition whatever at the place of the domicile."

See also Pinney vs. Provident Loan & Investtment Co. 82 S. W. 208.

In the light of these decisions I am constrained to hold that the judgment of the Civil District Court was rendered without due process of law and is therefore null and void. Entertaining these views it is unnecessary to pass upon the other questions presented by the record.

There will be a decree in favor of the complainant perpetually enjoining the defendant, as prayed for.

293 Decree Entered and Filed December 1, 1910.

United States Circuit Court,

Eastern District of Louisiana,

New Orleans Division.

No. 13,300.

In Equity.

Southern Railway Company

vs

Ephraim Simon

This cause came on at a former day to be heard upon defendant's rule to vacate the order appointing the Master and the exceptions to the Master's Report, filed herein by the defendant on February 4th. 1910, and also for final hearing upon the Bill of Complainant, Exhibits, Answer, Replication, Proofs and Testimony, and was argued by counsel for the respective parties and submitted;

Whereupon and on due consideration thereof, and for the written reasons on file,

It is now ordered, adjudged and decreed that the motion of respondent herein to vacate the order of June 10th. 1905, appointing Charles F. Buck as Master, be denied.

And considering the evidence and testimony adduced before the Master, and the law being in favor of the Complainant,

It is further ordered, adjudged and decreed that the Complainant have judgment in its favor and that the said Ephraim Simon be and he is hereby perpetually enjoined from further proceeding against the complainant, the Southern Railway Company, under the suit and judgment in the suit entitled Ephraim

Simon vs Southern Railway Company, No. 74,869 of the Civil District Court, for the Parish of Orleans, State of Louisiana; that the defendant, Ephraim Simon, be perpetually enjoined from issuing execution thereon or attempting thereunder to seize any property, movable or immovable, of said complainant, or in any manner attempting to enforce the same, and it is further
294 ordered, adjudged and decreed that the defendant pay the costs of this proceeding.

New Orleans, La., December 1, 1910.

(Signed) RUFUS E. FOSTER,

Judge.

295 Motion and Order Amending Decree.

Filed December 5th, 1910.

United States Circuit Court,

Eastern District of Louisiana,

New Orleans Division.

No. 13,300.

In Equity.

Southern Railway Company

vs

Ephraim Simon

On motion of Harry H. Hall, Solicitor for the Complainant, and on suggesting to the Court that there is an error in the Decree herein rendered and signed on December 1st., 1910, in that it decrees the nullity of the Judgment of the Civil District Court for the Parish of Orleans, which is not according to the prayer of the Bill of Complaint;

It is ordered that the said Decree be amended by striking out the words "said judgment being null and void and here so decreed" which occur in said decree after the words State of Louisiana, in the fifth paragraph of the Decree.

(Signed) RUFUS E. FOSTER

Judge.

December 5, 1910.

296 Order of Appeal.

Filed December 13th., 1910.

No. 13,300

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana. New Orleans Division.

Southern Railway Company,

vs

Ephraim Simon.

The above named defendant, Ephraim Simon, conceiving himself aggrieved by the order and decree entered on December —— 1910, in the above entitled proceedings, doth hereby appeal from said order to the Court of Appeal of the United States, for the Fifth Circuit, and appearer prays that this, his appeal, may be allowed and that a transcript of the proceedings and record and papers upon which said decree was made and entered, duly authenticated, may be sent to the Circuit Court of Appeal of the United States, for the Fifth Circuit, with the accompanying assignment of errors.

(Signed) LAZARUS, MICHEL & LAZARUS

" DAVID SESSLER

Solicitors for Ephraim Simon.

297 Southern Railway Company,

vs

Ephraim Simon.

No. 13300

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana. New Orleans Division.

And now, on the 13th day of December, 1910, comes Ephraim Simon, through his solicitors, and say: That the decree in said clause is erroneous and against the just rights of said Ephraim Simon, for the following reasons:

First,—That the court erred in maintaining its jurisdiction in this cause and by its decree in effect annulling the judgment of the State Court.

Second.—That the court erred in issuing and perpetuating the writ of injunction in this cause, the issuance of said writ being violative of the statutory prohibitions of the laws of the United States and of the rule of commity [comity] prevailing between State and Federal courts.

Third,—That the court erred in referring this cause, in the absence of consent, to a Master to report his findings of fact and of law, and erred in not maintaining the rule of the defendant to vacate the said appointment, and in not decreeing the operative effect of the order of reference to be limited to the rules of equity procedure.

Fourth.—That the Court erred in passing upon and determining adversely to defendant the constitutionality of the acts of the sovereign State of Louisiana, when no specific attack was made in complainant's bill upon the validity of the said legislation or of its violation of the Federal Constitution.

Fifth.—The court erred in passing upon the constitutionality of said legislation, without having previously determined that the complainant here was subjected to the jurisdiction of the State court by the conduct of its business in the State of Louisiana and its failure to appoint a specific and particular agent upon whom process could be served; that the determination
298 by the court of the constitutionality of the legislation of a sovereign state upon a moot question is reversable [reversible] error; that Act 54 of the Session of the Legislature of Louisiana, of 1904, under which process was served upon the complainant company is a valid statute and is in no respect repugnant to the Constitution of the United States.

Sixth.—That the court erred in not finding from all of the evidence in the cause, that the complainant herein, the Southern Railway Company, was, at the time of the obtention of judgment by the plaintiff in the State Court, and since that time, doing business in the State of Louisiana, and that by virtue of the laws of the State of Louisiana, complainant was subjected to the jurisdiction of its courts.

Seventh.—That the court erred in according any relief to the complainant as against the respondent, under the pleadings in this cause; the prayer for an injunction as against this respondent undertakes to and does destroy the effective force of the judgment of the State Court in a cause in which the said court had jurisdiction ratione materiæ et ratione personæ.

And respondent assigns other errors apparent upon the face of the record.

Wherefore, upon due consideration by the court of the assignments of error herein, appellant prays for a judgment of reversal and a judgment as prayed for in his answer dismissing complainant's bill of complaint.

(Signed) LAZARUS, MICHEL & LAZARUS

" DAVID SESSLER

Solicitors for Ephraim Simon.

299 Order.

It is ordered, that the appeal be allowed as prayed for, upon Ephraim Simon giving bond in the sum of One Thousand Dollars conditioned as the law directs, and which shall operate as a supersedeas.

New Orleans, La., December 13, 1910.

(Signed) RUFUS E. FOSTER

Judge.

300 BOND FOR APPEAL.....Filed December 15th, 1910.

Know all Men by these Presents, That we Ephraim Simon, as principal, and Henry L. Lazarus of New Orleans, as sureties, are held and firmly bound unto the Southern Railway Company in the full and just sum of One thousand Dollars to be paid to the said Southern Railway Company its certain attorney, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 14 day of December, in the year of our Lord, one thousand nine hundred and ten.

Whereas, lately at a Session of the United States Circuit Court, Fifth Judicial Circuit, holding sessions in and for the Eastern District of Louisiana, in a suit depending in said Court, between Southern Railway Co. Complt. and Ephraim Simon defendant No. 13300 of the Docket of said Court a Decree was rendered against the said Ephraim Simon and the said Ephraim Simon having obtained an Appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said Southern Railway Company citing and admonishing it to be and appear before the

United States Circuit Court of Appeals for the Fifth Circuit, to be holden at New Orleans, Louisiana, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said Ephraim Simon shall prosecute his appeal to effect, and answer all damages and costs, if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

..... (Signed) EPHRAIM SIMON (Seal)

by his attorneys

..... LAZARUS, MICHEL & LAZARUS (Seal)

..... HENRY L. LAZARUS (Seal)

Approved by —

(Signed) RUFUS E. FOSTER

Judge.

301 United States of America, Eastern District of Louisiana. } SS.

Personally appeared Henry L. Lazarus who being duly sworn, deposes and says that he is the surety on the within bond, that he resides in New Orleans, La. and is worth the full sum of One thousand Dollars, over and above all his debts and liabilities and property exempt from execution.

(Signed) HENRY L. LAZARUS.

Subscribed and sworn before me this 14 day of Dec. 1910.

(Seal) (Signed) H. J. CARTER

U. S. Commissioner, Eastern District of Louisiana.

U. S. Circuit Court,

Eastern District of Louisiana.

No. 13300

Southern Railway Co.

vs.

Ephraim Simon.

Bond.

302 Præcipe for Record. Filed January 2nd., 1911.

No. 13,300.

United States Circuit Court,

Eastern District of Louisiana,

New Orleans Division.

In Equity.

Southern Railway Company

versus

Ephraim Simon

In making up the transcript of appeal, to be filed in the United States Circuit Court of Appeals for the Fifth Circuit, the Clerk of the United States Circuit Court for the Eastern District of Louisiana, will include therein, the following, to-wit:—

1st. All of the pleadings, process, evidence, orders, decrees, and proceedings had, in the above cause, as contained in the printed transcript of the proceedings in the Supreme Court of the United States, offered by both parties and filed before the Special Master, April 16, 1909.

2nd. Motions, Petitions and orders thereon for enlarging time to take testimony, etc.

3rd. Stipulation and consent as to Master's fee.

4th. Master's Report and the Evidence & the Exhibits filed therewith.

5th. Rule to vacate order appointing Special Master.

6th. Exceptions to Master's Report.

7th. Motions and orders fixing Exceptions to Master's Report, and orders of continuances of Exceptions to Report.

8th. Hearing on Exceptions to Master's Report, etc., and submission.

9th. Opinion and final Decree of the Court.

10th. Proceedings on appeal.

New Orleans, La., December , 1910.

(Signed) HENRY L. LAZARUS
Solicitors for Appellant.

303 STIPULATION. Filed January 2nd., 1911.

No. 13,300.

United States Circuit Court,
Eastern District of Louisiana,
New Orleans Division.

In Equity.

Southern Railway Company
versus
Ephraim Simon

Stipulation.

It is hereby stipulated and agreed by and between the undersigned Counsel for Complainant and the Defendant, that the

following Exhibits, offered and filed on the trial of the above entitled and numbered cause, shall be transmitted, in the originals, with the transcript of appeal to the Honorable United States Circuit Court of Appeals for the Fifth Circuit, to-wit:—

1. Photograph marked "Jones #1,"
2. Photograph marked "Jones #2,"
3. Sketch marked "Jones 3,"
4. Plan marked "Jones #4,"

(Signed) HARRY H. HALL
Solicitor for Complainant,
" H. L. LAZARUS
Solicitor for Defendant.

United States of America,

Circuit Court of the United States,

Fifth Circuit and Eastern District of Louisiana.

Clerk's Office:—

I, HENRY J. CARTER, Clerk of the Circuit Court of the United States, for the Fifth Circuit and Eastern District of Louisiana, do hereby certify, That the foregoing 303 pages contain and form a full, complete, true and perfect transcript of the Record and Proceedings had, Assignment of Errors, together with all the evidence adduced on the trial of the case of The Southern Railway Company versus Ephraim Simon, No. 13,300 of the Docket of the said Court: said transcript being made up in accordance with the Præcipe of Counsel for Appellant, copied at page 302 of this transcript. Except the following evidence, to-wit: 1. Photograph marked "Jones #1," 2. Photograph marked "Jones #2." 3. Sketch marked "Jones 3." 4. Plan

marked "Jones #4," which evidence is transmitted to the Honorable United States Circuit Court of Appeals for the Fifth Circuit, in the originals with the transcript of appeal, in accordance with the Stipulation of Counsel, copied at page 303 of said transcript.

Witness, my hand and seal of said Court, at the City of New Orleans, Louisiana, this 10th day of January, A. D. 1911.

H. J. CARTER

[Seal.] Clerk.

* * * * * * * * *

That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:—

ARGUMENT AND SUBMISSION.

January 2nd, 1912.

EPHRAIM SIMON

vs No. 2168

THE SOUTHERN RAILWAY COMPANY.

On this day this cause was regularly called, and after argument by H. L. Lazarus, Esq., for appellant, and J. B. Monroe, Esq., for appellee, was submitted to the Court.

And thereafter, on the Fifth day of March, A. D. 1912, an opinion of said Circuit Court of Appeals was filed in said cause, in the words and figures following, to-wit:—

OPINION.

No. 2168.

United States Circuit Court of Appeals.

Fifth Circuit.

Ephraim Simon,

Appellant,

vs.

The Southern Railway Company,

Appellee.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

The Southern Railway Company, a corporation organized under the laws of the State of Virginia, filed its bill to restrain

Ephraim Simon, a citizen of the State of Louisiana, from enforcing a judgment rendered by the Civil District Court for the Parish of Orleans, Louisiana, against it and in favor of Simon for damages claimed to have been suffered by him as the result of an accident, occurring in the State of Alabama, while he was a passenger on one of the trains of the railway company. A temporary injunction issued, and during its pendency, Simon was arrested in a contempt proceeding wherein he was charged with violating the orders of the court. This proceeding found its way to the Supreme Court and is reported under the style of Ex Parte Simon, in 208 U. S., 144, to which reference is made for a further statement.

Upon the final hearing the temporary injunction was perpetuated, and from the decree Simon appeals to this court.

For the appellant: Henry L. Lazarus, Eldon S. Lazarus, Herman Michel, and David Sessler.

For the appellee: J. Blanc Monroe and Monte M. Lemann.

Before McCormick and Shelby, Circuit Judges, and Maxey, District Judge.

Memorandum opinion by direction of the Court.

By Maxey, District Judge:

Upon consideration of the issues involved in the present suit the following conclusions are announced:

1. That the Circuit Court had jurisdiction of the suit has been authoritatively decided in Ex parte Simon, 208 U. S., 144; see also Gaines v. Fuentes, 92 U. S., 10; Marshall vs. Holmes, 141 U. S., 589, and authorities therein cited. That decision is binding upon this court until reversed or modified by the Supreme Court.

2. At the time the petition was filed in the State court by the appellant to recover damages of the appellee, to-wit: December 1, 1904, the latter was doing business in the Parish of Orleans, State of Louisiana.

3. As to the service of process and validity of the judgment rendered by the State court against the appellee.

A copy of the citation was served on the Assistant Secretary of State who simply deposited it among the files of his office. The appellee had no notice of the suit. Judgment by default was taken and damages were assessed by the jury. Was

the service sufficient? The pertinent act of the legislature of Louisiana reads as follows:

"Section 1. Be it enacted by the General Assembly of the State of Louisiana, That it shall be the duty of every foreign corporation doing any business in this State to file in the office of the Secretary of State a written declaration setting forth and containing the place or locality of its domicile, the place or places in the State where it is doing business, and the name of its agent or agents or other officer in this State upon whom process may be served.

Section 2. Be it further enacted, etc., That whenever any such corporation shall do any business of any nature whatever in this State without having complied with the requirements of Section 1 (one) of this act, it may be sued for any legal cause of action in any parish of the State where it may do business, and service of process in such suit may be made upon the Secretary of State the same and with the same validity as if such corporation had been personally served."

Session Acts 1904, pp. 133-4.

Prior to filing the suit in the State Court the appellee had not named an agent upon whom process might be served, and, as before stated, service was had upon the Assistant Secretary of State.

We are of the opinion that service upon the Assistant was not the equivalent of service upon the Secretary of State. It is a fundamental principle of our jurisprudence that a person, whether artificial or natural, must have the opportunity of a hearing before being condemned. "It is," said the Supreme Court, " a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination. It is judicial usurpation and oppression and never can be upheld where justice is justly administered." Galpin v. Page, 18 Wall. 368, 9. See also Pennoyer v. Neff, 95 U. S., 714; Scott v. McNeal, 154 U. S., 34.

The method of service, indicated by the Statute, was not pursued in this case, and, employing the language of the Supreme Court, "the cases are numerous which decide that where a particular method of serving process is pointed out by statute, that method must be followed, and the rule is especially exacting in reference to corporations." Amy v. Watertown, 130 U. S., 316, 317, citing numerous authorities. And in the same case, at pages 317, 318 of 130 U. S., the court quotes approvingly the following language of the Supreme Court of Wisconsin used by the latter in The City of Watertown v. Robinson, 69 Wis. 233, 236, 237:

"When the statute prescribes a particular mode of service, that mode must be followed. Ita lex scripta est. There is no chance to speculate whether some other mode will not answer as well. This has been too often held by this Court to require further citations. • • • When the statute designates a particular officer to whom the process may be delivered, and with whom it may be left, as service upon the corporation, no other officer or person can be substituted in his place. The designation of one particular officer upon whom service may be had excludes all others. The temporary inconvenience arising from a vacancy in the office of mayor affords no good reason for a substitution of some other officer in his place, upon whom service could be made, by unwarrantable construction not contemplated by the statute."

The service of the citation upon the Assistant Secretary of State was not a compliance with the requirements of Act 54 of the legislature of Louisiana, and such service was therefore unavailing to bring the appellee into court. Since then there was neither valid service of process nor voluntary appearance on the part of the appellee, the judgment by default was void for the want of jurisdiction of the person.

The conclusion reached by the court renders it unnecessary to call in question the constitutionality of Act 54 quoted above. But see Gouner v. Missouri Valley Bridge & Iron Co., 123 La., 964.

The decree of the trial court, perpetuating the injunction is right, and it is therefore affirmed.

And on the Fifth day of March, A. D. 1912, in the record and proceedings of said Circuit Court of Appeals, is a judgment in said cause in the words and figures following, to-wit:—

JUDGMENT

Ephraim Simon

vs No. 2168.

The Southern Railway Company

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel;

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said Circuit Court in this cause be and the same is hereby affirmed.

It is further ordered, adjudged and decreed that the appellant, Ephraim Simon, and the surety on the appeal bond herein, Henry L. Lazarus, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the District Court of the United States for the Eastern District of Louisiana.

And thereafter, on the twenty-fifth day of March, A. D. 1912, a petition for rehearing was filed in said cause by Ephraim Simon, Appellant, in the words and figures following, to-wit:

United States Circuit Court of Appeals

Fifth Circuit.

No. 2168.

Ephraim Simon,

Appellant,

versus

The Southern Railway Company,

Appellee.

PETITION FOR REHEARING.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Sitting at New Orleans:

The petition of Ephraim Simon, appellant in the above styled and numbered cause, most respectfully shows:

That he is advised and believes that there is serious and grave error to his prejudice in the opinion and decree delivered in said cause by your Honors, and handed down on Tuesday, the 5th day of March, 1912; and he submits that your Honors should re-examine your said opinion and decree and grant him a rehearing in said cause on the following grounds and for the following reasons—to wit:

I.

Appellant does not dispute that the jurisdiction of the Circuit Court below, as between complainant and respondent, would have attached, ratione personae, if the subject-matter of the bill had been within the jurisdiction of the Circuit Court ratione materiae—to wit, the obtaining, by means of the writ of injunction, of relief in equity from a judgment at law recovered by respondent against complainant in a State court, which form of proceeding by injunction is expressly prohibited by a statute of the United States that is almost coeval with the Constitution itself. Judiciary Act of 1793 (March 2nd), C. 22, Sec. 5; 1 Stat. 334; U. S. Rev. Stat., Sec. 720.

Neither Ex parte Simon, 208 U. S. 144, nor Gaines vs. Fuentes, 92 U. S. 10, nor Marshall vs. Holmes, 141 U. S. 589, cited in the opinion of your Honors, is authority for the proposition that the Court below had jurisdiction ratione materiae to entertain the bill and grant the relief prayed for in this case. All that was decided in Ex parte Simon was that, as the Circuit Court had jurisdiction by reason of diversity of citizenship of the parties (ratione personae), and as there was, or could be made, colorable show of right to equitable relief by proper amendments to the bill, the Court would decline to determine in ad-

vance, upon the summary proceeding of habeas corpus, the actual merits of the controversy.

The exact language of the Supreme Court on this point in Ex parte Simon is as follows:

"The petitioner is in no position to demand this summary relief.

"This is not a suit coram non judice, and wholly void by reason of Revised Statutes, Section 720, forbidding United States Courts to stay by injunction proceedings in any State court. The Circuit Court had jurisdiction of the cause. That must be assumed at this stage. * * * Even if the order was erroneous, it would be going far to say that it was made without jurisdiction of the cause. (See United States vs. Shipp, 203 U. S. 563, 573.) But, without laying down a broader proposition than is required, we are of opinion that in the particular circumstances of this case habeas corpus is an extraordinary remedy, for which there has been shown no sufficient ground.

"It is argued that the bill does not disclose facts that warrant going behind the judgment, but contains only vague allegations of fraud. But it alleges facts that show a total want of jurisdiction in the State Court, and implies, at least, that the fictitious service was made with deliberate fraud. Its general nature and purpose are clear. Enough is alleged to amend by, if amendment is necessary, and to give jurisdiction to the Circuit Court. As we cannot pronounce the whole proceeding void, we have nothing to do with the sufficiency of the pleading or the question whether the bill would be good or bad on demurrer. There was at least color of right for the preliminary order, and it will be time enough to discuss the merits if the case comes here again after final decree." (Italics ours.)

Both Gaines vs. Fuentes, supra, and Marshall vs. Holmes, supra, cited by your Honors, were cases brought originally in the State Court of Louisiana and removed into the Federal Court under the terms of the removal statute.

The main Federal question, if not the only Federal question, presented for decision in those cases was the right of removal under the statute then in effect. All else save the right of removal was beside the issue. And, the right of removal being established, it followed necessarily that the Federal Court had the same power to grant relief that the State Court had where

the suit was originally brought. Being suits to annul fraudulent judgments obtained in the State Court, the Federal Court, by virtue of the removal, drew along with the case, when removed, all of the existing writs and processes already issued, together with the power that the State Court had to grant relief therein.

We submit that there is a vast difference between the two classes of cases. The right to remove an action of nullity based upon extrinsic fraud (for that was exactly the proceeding under the Louisiana law in both of these cases) and to proceed therein in the Federal Court, on the equity side, as the State Court would have proceeded, according to the State Court practice, had the cause remained, is one thing. The right to bring, as an original action of nullity in the Federal Court, a proceeding to enjoin the execution and to nullify the judgment of a State Court on a matter of form, or some other matter shown on the face of the record of the State Court, is quite another thing. In the former case, the jurisdiction is granted in express terms by the removal statutes. In the latter case, it is expressly prohibited by the judiciary act. The very point here raised was decided by the United States Circuit Court of Appeals for the Eighth Circuit in Railway vs. Burke, 66 Fed. 83. Followed in Blythe vs. Hinckley, 66 Fed. 246.

See Barrow vs. Hunton, 99 U. S. 80; Nougue vs. Clapp, 101 U. S. 551.

II.

Your Honors have found as a fact that the appellee, the Southern Railway Company, "had no notice of the suit" filed by appellant in the State Court. This finding is, we submit, only a bare inference from an unsworn letter not justified by the terms of the letter. We refer to the letter of Assistant Secretary of State McGivney to Mr. Harry H. Hall, addressed to "P. O. Box 444, New Orleans, La.," under date January 28, 1905, annexed as an exhibit to the bill of complaint. (Rec., pp. 18, 19.) In this laconic letter, although evidently written and worded at the request of Mr. Hall, McGivney speaks of the service of petition and citation as "made on us."

There is no sworn averment in the bill, for the jurat is made by an official of the complainant railway company who carefully limits the scope of his oath to the allegations of "citizenship and conduct of business of complainant." Nor is there the jurat, the affidavit or the deposition of any officer, agent, employee, servant or attorney of the Southern Railway Company in the record, or any other evidence in the record, denying the fact that the said railway company had full and ample notice of the suit and ample knowledge of what was demanded judicially by Simon in his suit, and that the railway company had ample opportunity to make full defense.

Neither Mr. Harry H. Hall, attorney at law and the dummy director representing (as he says himself) the interest of the Southern Railway on the board of the New Orleans Terminal Company, of which the Southern Railway was lessee within the City of New Orleans, nor W. W. Finley, the vice-president, nor John C. Andrews, the passenger agent, nor Bynum, the contracting agent, nor Graham, the freight agent, attempts to deny that all or any of them had notice of the suit. Of course, no notice to the corporation could mean only no notice to any of its officers or agents within the State, and no notice to any of its officers outside of the State also.

If the Court will read carefully the very astute and precise affidavit of Mr. Hall (Rec., pp. 65, 66, 67), of Andrews (Rec., pp. 64, 67, 68), and the affidavit and deposition of Finley (Rec., pp. 67, 68, 206), we believe your Honors will wonder why none of these witnesses deposed under oath that he (the deponent) did not have any notice of the suit, nor of the fact that service had been made on the Assistant Secretary of State. We believe that your Honors have been led into this error in your Honors' finding by the bare statement of Mr. Hall, the solicitor, when offering evidence on the hearing of the motion for a preliminary injunction (Rec., p. 83), wherein he states that the "Secretary of State addressed a letter to Mr. H. H. Hall," which he offered in evidence; and he refers particularly to that part of the letter "to the effect that the Secretary of State received the summons and did not send it to the Southern Railway Company, but put it on the files of his office."

Now, we submit that the letter referred to contained no

such statement as zealous counsel then and there suggested. It states plainly:

"Acting on instructions of the Attorney-General, we simply filed the copy of citation and petition made on us in the case of Ephraim Simon," etc.

The letter was signed by Eugene J. McGivney, Assistant Secretary of State, not by John T. Michel, Secretary of State, as stated by counsel. It is very plain, therefore, that in Mr. Hall's mind service on the Assistant Secretary of State was, in the law of Louisiana, tantamount to, and the same thing as, service on the Secretary of State.

The important thing that he thought he was "cocksure" about was that the corporation was not doing business within Louisiana. And the legal inference that he drew from this is plainly shown in his testimony (Rec., p. 196), where he says, "I considered there was no citation"; this being stated as one of the reasons why he did not ask the State Court to enlarge the delay (three judicial days) he needed within which to apply for a new trial, nor counsel for indulgence in behalf of an unrepresented defendant. Mr. Hall's fervid and pointed protests to Judge Sommerville that the corporation was "totally unrepresented within this State," and his reply to the Judge's questions that "he did not represent, as its counsel in this city, the Southern Railway," as shown in his ex parte affidavit (Rec., p. 65), show still more plainly that Mr. Hall was then and there planning another method of procedure for the Southern Railway than asking for a new trial, or asking counsel for indulgence, or for an opportunity to make defense to Simon's suit.

When we read, further, in Mr. Hall's affidavit, that the bill was drawn by Mr. Hall as solicitor, not from facts gathered by himself or under his direction, or from facts within his knowledge, but "upon the statements made to him by said Col. Henderson," it becomes a certainty that Mr. Hall was preparing to make up for his friends, Col. Henderson and Mr. Spencer, a case in equity as solicitor. Why else did Mr. Hall deem himself called upon to disclaim in this affidavit that, when he drew the bill as solicitor, and when he signed it and filed it as attorney in fact, for the Southern Railway Company, he assumed any personal responsibility for its recitals or averments? It is passing strange.

III.

Your Honors have pitched your entire decision against appellant upon one single point that is ultra petitionem—to wit, that the service of citation in Simon's suit in the State Court was made on the Assistant Secretary of State, and that, hence, it was a method of service not authorized by the letter of the statute of the State of Louisiana, and was, therefore, ineffectual and void. The mode and manner of service of citation is patent on the face of the record of Simon's suit in the State Court.

It is true that Act 54 of 1904 of Louisiana directs the service of process upon the Secretary of State, but the universal and undoubted rule of interpretation with reference to such statutes and statutes in pari materia is that the process is to be served on the office of Secretary of State, and not upon the person filling the office. Process is directed to the office of the Secretary of State, and not to the individual holding that office.

The Assistant Secretary of State in his letter to Hall makes it plain that he so understands the law by using the pronouns we and us in speaking of the service.

The office of Secretary of State in Louisiana is created by the Constitution of the State, and the Assistant Secretary of State is a constitutional officer (Article 79), with delegation by the Constitution of "authority to perform all the acts and duties of the office of Secretary of State." (Ibid.) So that, under the Constitution of Louisiana, the duties of Secretary of State are charged upon both the Secretary of State and his lawfully appointed Assistant. And, therefore, service of process upon the Assistant Secretary of State is the service of process upon the Secretary of State, and, therefore, is a compliance with the requirements of Act 54 of 1904, directing, under the conditions recited in the act, the service upon the Secretary of State,—that is, the office, and not the man.

Aside from the constitutional provision making the Assistant Secretary of State a constitutional officer, and charging him with all the duties of Secretary of State, the statute law of this State, enacted before the adoption of the present Constitution, authorized the appointment of the Assistant Secretary of State, who was

"fully authorized to perform all or any of the duties or official acts required by law of the Secretary of State during the sickness or absence for any cause of the latter." * * *

Rev. Stats. of 1870, Sec. 3523.

The Sheriff's return here recites that at the time of service upon the Assistant Secretary of State, John T. Michel, the Secretary of State, "was absent." That fact is not questioned, and is concluded by the finding of the jury and the judgment of the State Court. The validity of the service under the Constitution and laws of Louisiana was the basis of the State Court's jurisdiction to implead a foreign corporation doing buinesss within the State without any designated agent, and is, we submit, not reviewable here. It is unthinkable, as a legal proposition, that the Legislature of the State, in providing for service of process upon foreign corporations doing business in Louisiana without such designated agent, in order to subject them to the jurisdiction of the Courts through service of process upon the office of Secretary of State, was called upon to incorporate in the statute pre-existing laws authorizing service upon his constitutional assistant, duly appointed and qualified, and charged with all the duties of his office, or that it was called upon to recite at length in the statute that which was already the law, independently of the Constitution, that, in the absence of the Secretary of State, service might lawfully be made upon the Assistant Secretary of State.

We submit that, when the Constitution of the State and the laws of the State charge the duties of the office of Secretary of State upon his duly appointed Assistant, the service upon such Assistant Secretary of State is, within the terms of the Constitution and the statute, a service upon the Secretary of State.

The Supreme Court of Louisiana, in interpreting the statutes of the State in relation to the duties of the Assistant Secretary of State, has held that the Assistant Secretary of State is charged with the duties of the Secretary of State, and is, when discharging the duties required of him, the Secretary of State.

State vs. Clark, 46 La. An. 1409.

The bill of complaint in this case, paragraph 5 (Rec., pp. 3, 4), makes it quite clear that, in the opinion of the solicitor

who prepared the bill, the special attorney in fact who filed it, and the corporation itself, as advised both by Col. Henderson and Mr. Hall, it was tantamount to the same thing in fact and in law to serve process on the Assistant Secretary of State as to serve it on the Secretary of State.

The exact language of the bill in that regard is as follows:

"That said suit was entered in the Civil District Court for the Parish of Orleans, and a citation issued therein and was served on the Assistant Secretary of State of Louisiana on December 3, 1904, said Simon maintaining that your orator was a foreign corporation, doing business in the State of Louisiana, which had not filed in the office of the Secretary of State a written declaration setting forth the locality of its domicile and the place or places in this State where it is doing business, and had failed to name an agent upon whom process might be served; and claiming that, by reason thereof and by virtue of Act No. 54 of 1904 of the Acts of the General Assembly of the State of Louisiana, he was, in such case and by reason of such omission, justified in serving said citation on the said Secretary of State."

The Court will also note the literal terms of the following sentence of paragraph 6 of the bill (Rec., p. 4):

"And your orator avers that the attempted service of said citation upon the Secretary or Assistant Secretary of State of Louisiana was not a citation upon your orator," etc.

And the bill proceeds (in the same paragraph) to aver that the act of the Legislature of the State, No. 54 of 1904, providing for such form of citation, if intended to operate upon a corporation not "transacting business within the limits thereof, and has no agent therein," would be an attempted reguation of interstate commerce by the State, in violation of the Constitution of the United States.

We have also quoted above Mr. Hall's statement when offering complainant's evidence on the hearing of the motion for a preliminary injunction, and his affidavit and deposition.

Complainant sought in its bill to seize the jurisdiction of the Federal Court ratione materiae by specious averments of fraud—first, that Simon obtained his judgment by false swearing; and, second, that Simon obtained his judgment by falsely alleging and pretending that the Southern Railway Com-

pany was doing business in Louisiana, while (as complainant alleged) it was not doing business in Louisiana, and, hence, that the Southern Railway Company did not come within the purview of Act 54 of 1904, and that the mode of service provided by the Louisiana statute for such cases did not apply to complainant.

These averments of fraud, as results proved, were merely specious and colorable. We say colorable, first, because the Master found that Simon committed no fraud whatsoever; and, second, this Court has found that the Southern Railway Company was doing business in this State at the time Simon instituted suit.

These two facts being found in the defendant Simon's favor, the bill is stripped of all equitable grounds, and the jurisdiction ratione materiae of the Circuit Court, sitting as a court of equity, is left barren.

Wherein, then, lies the power of the Circuit Court, sitting as a court of equity, to enjoin the execution of a State judgment on a purely legal ground—namely, on a refined technical construction of Act 54 of 1904 as to whether service was made upon the Secretary of State or upon the Assistant Secretary of State? What well-known head of equity jurisdiction is here called into play? What equitable ground or what equitable theory can be invoked by a Federal Court deciding a question of purely State law? Upon what basis of equitable jurisdiction can the extraordinary writ of injunction, the most powerful arm of a court of equity, be invoked to grant relief against the execution of a State judgment on legal grounds?

When a party comes into equity he must, in order to obtain relief, show an equitable cause of action, and when he fails in his proof his bill must be dismissed; yet in this case complainant utterly failed to establish its case of fraud against Simon. Both of the averments of complainant's bill relating thereto have been found in favor of the defendant Simon, and yet,—wonderful to say and remarkable to relate,—after winning his case on the merits of the bill, Simon to-day stands enjoined from executing his judgment because the Court has decided a technical moot question of State law in the case against him—namely, that service was made upon the Assistant Secretary of State, instead of upon the Secretary of

State—and that decision, too, determined without a word of reference to the Constitution of Louisiana, showing the duties of the Assistant Secretary of State as a constitutional officer, and without a word of reference to the statutes of Louisiana, which likewise define his powers.

The Court must bear in mind that the bill of complaint contains no allegation that the service upon the office of the Assistant Secretary of State was collusive as between Simon and the Secretary of State, nor could such an allegation have been made. Hence, without a vestige of equitable jurisdiction left in the bill, the Court, after finding all the basic facts on the subject of fraud in defendant's favor, instead of at once dismissing the bill, actually has allowed an injunction not justified, we submit, by a single authority cited in its opinion. Nor could such an authority be cited from the English or American courts of equity, which have never permitted the Courts of one sovereign, by an independent injunction bill, to grant relief from the judgment entered by the Court of another sovereign on the narrow, technical, legal ground of an alleged formal defect in citation, such as, in your Honors' opinion, controls the decision in this case, and that independently of the prohibition of Section 720 of the United States Revised Statutes.

The case at bar is, we submit, on all-fours with Railway vs. Burke, 66 Fed. 83, 88; Blythe vs. Hinckley, 84 Fed. 246; Barrow vs. Hunton, 99 U. S. 80; Nougue vs. Clapp, 101 U. S. 551.

The whole gravamen of the bill, and of all of the affidavits, jurats and depositions in the record, we submit, makes certain the fact that it was the deliberate policy of the corporation, its operating as well as its legal departments, not to appear to be doing business within the State of Louisiana, and not to appear to have any representative or agent within the State upon whom citation or other process could be served; and the bill makes no point whatever of service on the Assistant Secretary of State instead of on the Secretary of State. The fact that the corporation has been for many years doing business within the State stands out so clearly in the record that your Honors plainly and emphatically so find in the face of all these "protesting" jurats, affidavits and depositions.

"Methinks the lady doth protest too much" was the keen criticism of Hamlet's mother upon the mock play.

IV.

With the finding of your Honors that the Southern Railway Company, a foreign corporation, was, and had been for many years, at the time of Simon's suit, "surreptitiously" doing business within the State of Louisiana without any specially empowered agent upon whom process could be served, it is plain that the corporation thereby brought itself within the terms and provisions of the Louisiana statute, Act 54 of 1904, made and provided for just such cases, and made the jurisdiction of the State Court operative, as set up in Simon's petition. If these averments of "not doing business within the State" and not being represented therein by an officer, agent or attorney be stricken out, all the rest of the bill is mere "purple patchwork." It simply presents the case of a foreign corporation seeking to ignore and defy the laws of a sovereign State.

V.

The complainant's remedy at law in the State Court was clear, plain and adequate:

(a) By action of appeal on the face of the service of citation said to be defective in form, with a right to a writ of error to the Supreme Court of the State from the Supreme Court of the United States, in the event of an adverse decision, upon showing that a Federal question was involved.

(b) By action of nullity, under Article 605 of the Louisiana Code of Practice, by reason of want of formal citation, as alleged, and also by reason of the so-called "frauds and ill-practices" set up in the bill, if plainly specified and proved. (Code of Practice, Art. 607.) And there was also a right to a writ of error, in the advent of an adverse decision, upon bringing up a Federal question on the record.

There is less reason for the United States Court, sitting in Louisiana, to attempt to annul or enjoin the execution of a judgment of a Court of that State than of that of any other State in the Union, for the reason that law and equity here in the Louisiana State Courts are all one, and an equitable defense can be set up in Louisiana to a suit at law. The rem-

edy of the action of nullity in Louisiana is purely statutory (C. P., Arts. 605, 606, 607), although the grounds thereof set out in Article 607 are almost literally the same as the grounds upon which a Court of equity would grant relief from a judgment recovered at law.

See Barrow vs. Hunton, supra, and Nougue vs. Clapp, supra.

VI.

The decree in this cause denies to the defendant the protection accorded him by the Constitution of the United States, inasmuch as it totally destroys his right of action and reasonable indemnity for the injuries for which complainant admitted its liability; and this denial, resting solely on the basis of want of purely formal service, in accordance with the Court's interpretation of the statute, was not advanced or urged by complainant in its bill for relief. Plaintiff's right to indemnity and his cause of action arose in February, 1904, and by the statute laws of the State of Louisiana, in such cases made and provided, the right to recover for the injuries must be instituted and the defendant cited within one year from the time when the damages were sustained, or the same is barred by the statutes of limitation (Louisiana Civil Code, Art. 3537). So that, with an admitted liability to respondent upon the part of the complainant, and with no complaint in the bill as to the service of citation as made on the Assistant Secretary of State, the decree herein deprives plaintiff of his right of action and of his property rights as recognized thereunder, evidenced by the judgment enjoined in this case, and which injunction was issued and maintained in violation of Section 720 of the Revised Statutes of the United States, prohibiting the United States Courts from issuing a writ of injunction to stay proceedings in the Courts of the States.

In conclusion, we most respectfully submit that the Civil District Court, in entertaining jurisdiction to try Simon's suit, must have interpreted the statute of the State of Louisiana, and must have decided that the mode of service of citation in Simon's case—to wit: on the Assistant Secretary

of State of Louisiana—was in accord with Act 54 of 1904, and was a valid and effective service under the law of Louisiana.

Your Honors' decree in this case, affirming the decree of the Circuit Court, is merely a reversal of the State Court's decision on a pure matter of State law, which the State Court did decide and must have decided in order to reach its judgment or decree in Simon's case.

And we further submit that the Civil District Court was a court of original jurisdiction, just as was the Circuit Court of the United States, and there is no power in the latter court to sit in judgment upon, and review the findings of law or fact by, the former tribunal, a court of co-ordinate jurisdiction, under the Laws of the Land.

Railway Company vs. Burke, 66 Fed. 83, 88.

Appellant therefore prays that your Honors would be pleased to grant him a rehearing in said cause, an oral argument, and full relief; and he will ever pray.

By his solicitors:

HENRY L. LAZARUS,
ELDON S. LAZARUS,
HERMAN MICHEL,
DAVID SESSLER,
Solicitors for Petitioner.

GIRAULT FARRAR,
Of Counsel.

I hereby certify that, in my opinion, the within application is well founded in law, and I further certify that said application is not made for the purpose of delay.

(Signed) ELDON S. LAZARUS,
Solicitor for Petitioner.

New Orleans, March 25, 1912.

And on the Ninth day of April, A. D. 1912, in the record and proceedings of said Circuit Court of Appeals, is an order in said cause, in the words and figures following, to-wit:—

Ephraim Simon
vs
The Southern Railway Company
No. 2168

Ordered that the petition for rehearing filed in this cause be, and the same is hereby denied.

And thereafter, on the Twenty-fourth day of April, A. D. 1912, a petition and order for an appeal, with supersedeas, to the Supreme Court of the United States, and an assignment of errors, were filed in the said cause by Ephraim Simon, Appellant, in the words and figures following, to-wit:—

PETITION FOR APPEAL

Ephraim Simon,

Appellant

vs

No. 2168

The Southern Railway Company,

Appellee.

The petition of Ephraim Simon, Appellant in the above numbered and entitled cause, with respect shows:

That said cause is now pending in the United States Circuit Court of Appeals for the Fifth Circuit, and that judgment has been rendered therein and became final on the 9th day of April, 1912, affirming the decree of the Circuit Court of the United States for the Eastern District of Louisiana, New Orleans Division; that the matter in controversy in said suit exceeds Five Thousand ($5000.00) Dollars, besides costs; that the jurisdictional averment of the Circuit Court of the United States set out by the Southern Railway Company in its bill of complaint, is based upon two grounds:

1st. Diversity of citizenship;

2nd. The claim of complainant that against the enforcement of the judgment complained of and sought to be enjoined, it is averred that complainant's rights were protected under and by virtue of Paragraph (3), Section (8), Article (1) of the Constitution of the United States, and by Section (1) of the Fourteenth Amendment to the Constitution of the United States.

That the jurisdiction of the Circuit Court to grant the relief sought by complainant and the exercise of which jurisdiction was approved and affirmed by this Court, was dependent upon the recognition of complainant's right to the protection of the Federal Constitution, as set out in its bill, without which the

Circuit Court and this Court would be without power or jurisdiction to grant the relief prayed for.

That the Circuit Court and the Circiut Court of Appeals upon complainant's bill assumed jurisdiction of said cause, and the Circuit Court of Appeals affirming the judgment of the Circuit Court rendered judgment enjoining the execution of the judgment of the State Court of Louisiana, in violation of Section 720 of the Revised Statutes of the United States, and that this is a proper cause to be reviewed on appeal, by the Supreme Court of the United States.

Wherefore, the said Ephraim Simon, Appellant, prays that an appeal with supersedeas be allowed him in the above entitled cause, directing the Clerk of the Circuit Court of Appeals for the Fifth Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignments of error herewith filed by said appellant, may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

(Signed) HENRY L. LAZARUS

Solicitor for Pet'r.

(Signed) HERMAN MICHEL

(Signed) ELDON S. LAZARUS

(Signed) DAVID SESSLER

Of Counsel

ORDER ALLOWING APPEAL.

Ephraim Simon,

Appellant,

vs

No. 2168.

The Southern Railway Company,

Appellee.

It is hereby ordered, That an appeal with supersedeas prayed for herein, to the Supreme Court of the United States,

be and is hereby allowed, petitioner herein to give bond in the sum of One Thousand ($1000.00) Dollars, to be approved by Hon. Rufus E. Foster, United States District Judge, for the Eastern District of Louisiana.

April 23, 1912

(Signed) DAVID D. SHELBY
Judge of the United States Circuit
Court of Appeals, Fifth Circuit.

ASSIGNMENT OF ERRORS

Ephraim Simon,

Appellant

vs. No. 2168

The Southern Railway Company,

Appellee.

ASSIGNMENT OF ERRORS.

Ephraim Simon, the appellant in the above entitled cause, in connection with his petition for appeal herein, presents and files herewith his assignments of error, as to which matters and things he says that the decree entered herein on the 9th day of April, 1912, is erroneous in this, to-wit:

—I—

That the Circuit Court of Appeals erred in holding that the Supreme Court of the United States authoritatively decided in Ex Parte Simon, 208 U. S., that the Circuit Court of the United States had jurisdiction of the suit of the Southern Railway vs. Ephraim Simon, and that the decision was binding and conclusive upon the Circuit Court of Appeals. Whereas, it appears from the opinion of the Supreme Court of the United States and the judgment dismissing the relator's petition for habeas corpus, that the Court did not determine the question of jurisdiction, and indeed declined to decide the question of jurisdiction in that proceeding.

—II—

That the Circuit Court of Appeals erred in affirming the jurisdiction of the Circuit Court of the United States ratione materiae, and by its decree perpetuating the injunction issued by said Court staying proceedings in the State Courts of Louisiana, and by the operation of said writ of injunction arresting the execution of the judgment of the State Court upon a matter of mere form.

—III—

That the Circuit Court of Appeals erred in affirming the jurisdiction of the Circuit Court of the United States, based on the averments of complainant's bill that the judgment of the State Court was in its effect and operation violative of Article (1) Section (8), Paragraph (3) of the Constitution of the United States and of Section (1) of the Fourteenth Amendment to the Constitution of the United States; and the Court erred further when by its decree in this cause it recognized the power and authority of the Circuit Court of the United States to annul a judgment of the Civil District Court of the Parish of Orleans, State of Louisiana, a Court of concurrent jurisdiction with the said Circuit Court of the United States.

—IV—

That the Circuit Court of Appeals erred in assuming and asserting jurisdiction to enjoin the execution of a judgment of the State Court or to stay proceedings therein, in violation of Section 720 of the Revised Statutes of the United States, and of the uniform jurisprudence of the Supreme Court of the United States thereunder.

—V—

That the Circuit Court of Appeals erred in affirming the judgment of the Circuit Court of the United States, which by its judgment annulled the judgment rendered by the State Court

in a case wherein the State Court had jurisdiction ratione materiae et ratione personae.

—VI—

That the Circuit Court of Appeals erred in reviewing and passing upon the mode of service of process in the State Court, when the question of the mode of service of process was not raised upon the pleadings in the case, and the decision of the Circuit Court of Appeals on this point was ultra petitionem.

—VII—

That the Circuit Court of Appeals erred in asserting and exercising jurisdiction in a case wherein it was absolutely without jurisdiction ratione materiae.

—VIII—

That the Circuit Court of Appeals erred in passing upon the mode of service of process in the State Court and in declaring the same void, when the State Court had determined by its assertion of jurisdiction and its judgment thereunder, that the mode of service of process was legal and effective; the action and decision of the Circuit Court of Appeals in this regard was in disregard of the Seventh Amendment to the Constitution of the United States.

—IX—

That the Circuit Court of Appeals erred in holding, in disregard of the Constitution of the State of Louisiana, and of the Statute Law of this State, that service upon the Assistant Secretary of State was not a good and valid service, inasmuch as under the Constitution and Statutes of this State, of which the Circuit Court of Appeals was duly advised, the duties of the Secretary of State, during the latter's absence, may be discharged by the Assistant Secretary of State, who is, under the Constitution and laws of Louisiana, pro hac vice the Secretary of State.

—X—

That the Circuit Court of Appeals erred in not according recognition to the assignments of error on the plaintiff's appeal from the United States Circuit Court, and which assigned errors were pertinent to the determination of the questions submitted to said United States Circuit Court of Appeals on the appeal from the United States Circuit Court, and particularly so as to the first, second and seventh assignments as embodied in this record.

—XI—

That the Circuit Court of Appeals erred in maintaining the bill of complaint and in perpetuating the injunction herein, because the averments made by complainant for the purpose of seizing the equitable jurisdiction of the Court were merely colorable; the court found on the merits, first, that the defendant, in obtaining his judgment was free from the charge of fraud or ill-practices, and secondly, that the Southern Railway Company was doing business in Louisiana at the time Simon instituted his suit in the State Court against the Company.

—XII—

That the Circuit Court of Appeals erred in maintaining the complainant's bill and in perpetuating the injunction herein, because the bill having been stripped of all equitable grounds on the merits, all the basic facts having been found in the defendant's (Simon) favor, the jurisdiction of the United States Circuit Court, sitting as a Court of Equity, was left barren, and the bill of complaint should have been dismissed.

—XIII—

That the Circuit Court of Appeals erred in maintaining complainant's bill and in perpetuating the injunction herein, because a Court of Equity, State or Federal, is without power by its writ of injunction to enjoin a judgment of a Court of concurrent jurisdiction, merely because said Court differs in its

interpretation of a statute of a State; in this case in the interpretation as to the mode of service of process, namely, whether the service, under Act No. 54 of 1904 of the State of Louisiana, was made upon the Secretary of State or his Assistant,—purely a legal question.

—XIV—

That the Circuit Court of Appeals erred in maintaining the bill of complaint and in perpetuating the injunction herein, when it was demonstrated that no right of the complainant under the Federal Constitution was infracted or denied, and complainant's remedy at law in the State Court was clear, plain and adequate. (1) By action of appeal to the Supreme Court on the face of the service and citation, with the right in the event of an adverse decision, to a writ of error to the Supreme Court of the United States. (2) By action of nullity in the State Court under Articles 605 and 606, Code of Practice of Louisiana, and then under Section 709 of the Revised Statutes of the United States, to the Supreme Court of the United States.

—XV—

That the Circuit Court of Appeals erred in maintaining the bill of complaint and in perpetuating the injunction herein, because said Circuit Court was without jurisdiction ratione materiae to revise or review the judgment of the State Court, the State Court having decided that the mode of citation was valid and effective under the law of Louisiana.

—XVI—

That the Circuit Court of Appeals erred in maintaining the bill of complaint and in perpetuating the injunction herein, because it has attempted to re-examine the question of fact tried and decided by a jury in an action at law in the State Court, which is contrary to the Seventh Amendment to the Constitution of the United States.

—XVII—

That the Circuit Court of Appeals erred in maintaining the bill of complaint and in perpetuating the injunction herein, in that its judgment has in effect annulled and set aside the judgment of a State Court, in contravention of Article (4), Section (1) of the Constitution of the United States, wherein the Courts of the United States are bound to give the judgments of the State Courts the same faith and credit that the Courts of one State are bound to give to the judgments of Courts of sister States.

—XVIII—

And appellant assigns other errors apparent upon the face of the record.

Wherefore, appellant prays that said decree herein complained of may be reversed, and that appellant may have an adjudication and decree in his favor, in accordance with law and equity, and as herein specified.

(Signed) HENRY L. LAZARUS

Solicitor for Appellant.

(Signed) HERMAN MICHEL

(Signed) ELDON S. LAZARUS

(Signed) DAVID SESSLER

Of Counsel for Pet'r.

April 23rd, 1912.

BOND OF APPEAL.

Filed May 1, 1912.

Know All Men by These Presents, That we, Ephraim Simon, of New Orleans, Appellant, as principal, and Henry L. Lazarus,

of New Orleans, La., as surety, are held and firmly bound unto the Southern Railway Company, Appellee, in the full and just sum of One Thousand Dollars to be paid to the said Southern Railway Company, Appellee, its certain attorneys, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals and dated this first day of May in the year of our Lord one thousand nine hundred and twelve (1912).

Whereas, lately at a term of the Circuit Court of Appeals for the 5th Circuit in a suit depending in said Court, between The Southern Railway Company, as plaintiff, and Ephraim Simon as defendant, in Equity, a judgment was rendered against the said Ephraim Simon perpetuating the Injunction issued against him, his attorneys, etc., and the said Ephraim Simon assigning error thereon, and having obtained an appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the said judgment in the aforesaid suit, and a citation directed to the said Southern Railway Company, Appellee, citing and admonishing it to be and appear before the Supreme Court of the United States, to be holden at Washington, D. C., within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said Ephraim Simon, Appellant herein, shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

(Signed) EPHRAIM SIMON, (Seal)

by his Attorney and Solicitors,

LAZARUS, MICHEL & LAZARUS (Seal)

(Signed) HENRY L. LAZARUS (Seal)

Approved by—

RUFUS E. FOSTER,

Judge.

CITATION.

Citation to Appellees

The United States Circuit Court of Appeals,

Fifth Circuit.

The United States of America, Fifth Circuit.

To the Southern Railway Company:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the City of Washington, in the District of Columbia, thirty days after the date of this citation, pursuant to an appeal allowed and filed in the Clerk's office of the United States Circuit Court of Appeals for the Fifth Circuit, wherein Ephraim Simon is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable David D. Shelby, Judge of the United States Circuit Court of Appeals for the Fifth Circuit, this 23rd day of April, A. D. 1912.

(Signed) DAVID D. SHELBY,

(Seal) Judge United States Circuit Court of Appeals, Fifth Circuit.

MARSHAL'S RETURN ON CITATION.

Received by U. S. Marshal, New Orleans, La., May 1, 1912. On this 2nd day of May, 1912, before the undersigned authority personally appeared Frank Patten, Deputy U. S. Marshal for the Eastern District of Louisiana, personally known to me as such, who being duly sworn, deposes and says that he, affiant, did on the 1st day of May, 1912, serve this writ on The Southern Railway Company by handing same to Mr. J. B. Monroe, at-

torney of record for said Railway Company, in person, in the City of New Orleans, Louisiana.

(Signed) FRANK PATTEN

Deputy U. S. Marshal

Sworn to and subscribed before me on this 2nd day of May, 1912.

(Signed) FRANK H. MORTIMER

(Seal) U. S. Commissioner.

United States of America,

United States Circuit Court of Appeals

Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 309 to 337 next preceding this certificate contain full, true and complete copies of all the pleadings, record, entries, and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 2168, wherein Ephraim Simon is Appellant, and The Southern Railway Company is Appellee, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 308 were printed under my supervision, and are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 14th day of May, A. D. 1912.

(Signed) Frank H. Mortimer,

Clerk of the United States Circuit Court of Appeals

(Seal)

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 24.

EPHRAIM SIMON,

Appellant,

versus

SOUTHERN RAILWAY COMPANY,

Appellee.

Appeal From the United States Circuit Court of Appeals for the Fifth Circuit.

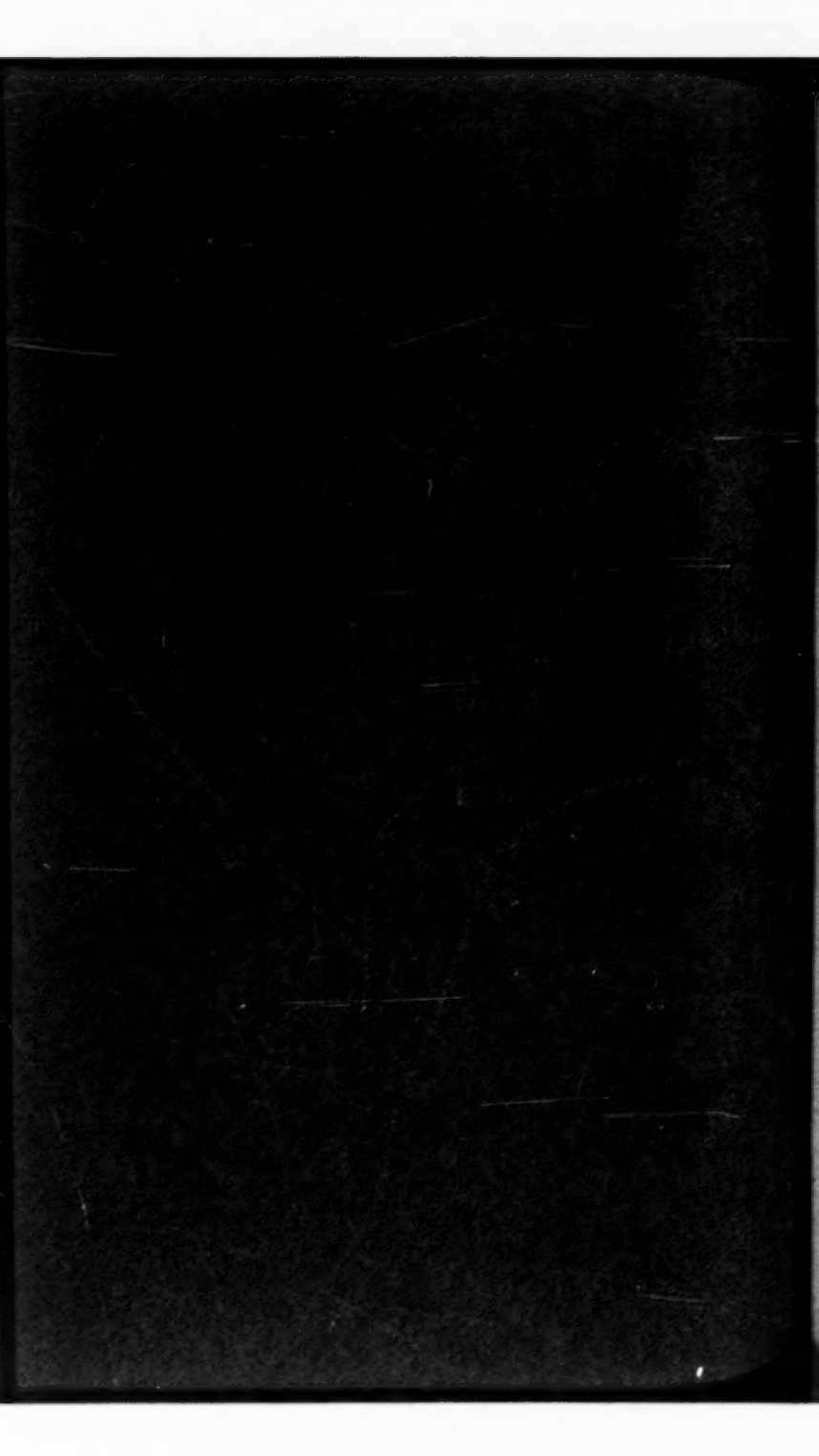
Brief on Behalf of Appellee.

HENRY L. LAZARUS,
Solicitor for Defendant and Appellee.

HERMAN MICHEL,
ELDON S. LAZARUS,
DAVID SESSLER,
GIRAULT FARRAR,
Of Counsel.

September 20, 1916.

R. P. Andrus Pub. Co., Bauer Printing, 516 Natchez St.



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Supreme Court of the United States

OCTOBER TERM, 1914.

No. 34.

EPHRAIM SIMON,

Appellant,

versus

SOUTHERN RAILWAY COMPANY,

Appellee.

Appeal From the United States Circuit Court of Appeals for the Fifth Circuit.

Brief on Behalf of Appellant.

STATEMENT OF THE CASE.

The appellant, Ephraim Simon, while being carried as a passenger on one of the regular passenger trains of the Southern Railway Company, sustained personal

injuries, and other damages, through a collision occurring between trains on the line of the Southern Railway Company, on February 8th, 1904. He filed suit in the Civil District Court for the Parish of Orleans, in the State of Louisiana, on December 1st, 1904, setting out in his petition his cause of action against the Southern Railway Company, together with the nature, character and extent of his injuries, and the items and quantum of his damages, and alleged that his said damages had occurred solely through the gross fault and negligence of the Southern Railway Company. (Rec., p. 8-14.)

Upon further setting out that the Southern Railway Company was a foreign corporation, "doing business within the City of New Orleans, in the State of Louisiana, without having designated or appointed any agent therein," upon whom process of citation might be served, as required by the law of said State, he prayed for service of citation upon the Secretary of State of the State of Louisiana, pursuant to the provisions of Section 1, of Act No. 54 of the Session of 1904, of the Legislature of Louisiana, specially praying "that said service so made be a service upon the said Southern Railway Company, as provided for in the act aforesaid." And he further prayed that after the legal delays and due proceedings, that he have judgment against said defendant, etc., with the further prayer for trial by jury, for costs and for general relief. (Rec., pp. 8-14.)

Citation in due form of law, under the seal of the Court, issued as prayed for, and was served by the Sheriff on December 3rd, 1904. (Rec., pp. 14-15.) The

Sheriff made return of service upon the citation, and duly filed the same, on December 6th, 1904. (Rec., p. 15.)

According to the statute law of Louisiana (Code of Practice, Art. 311), in the event of no appearance made by the defendant, or answer filed, default was due and could have been entered upon this process on December 15th, 1904. No appearance being made by the Southern Railway Company, and no answer having been filed, default was moved for and judgment by default was duly entered in open Court on January 10th, 1905, upon showing to the Court that the "defendant had failed to answer, though duly cited." (Rec. p. 15.) By the terms of the statute of Louisiana, judgment by default may be confirmed, and definitive or final judgment may be rendered in the cause on the third judicial day after entry of default. (Code of Practice, Art. 312.) So that, default in this cause having been duly entered, final judgment could have been rendered on the 13th day of January, 1905.

On January 16th, 1905, from a panel of jurors duly summoned in open Court, a jury of twelve men were drawn; witnesses for the plaintiff—including the plaintiff himself—were duly sworn before the jury; the jury were charged by the trial Judge; the foreman of the jury was selected and appointed by the Court, and the jury retired to deliberate on their verdict. (Rec., p. 17.) After deliberation the jury returned into Court, and, through their foreman, handed down the following verdict, endorsed on the reverse of the petition:

> "We, the jury, find in favor of the plaintiff in the sum of thirteen thousand three hundred and

forty-eight and 00/100 dollars, with interest and costs.

(Signed) "**Samuel Mohurter,**
"Foreman."

(Rec., p. 17.)

On motion of counsel for the plaintiff, the verdict was ordered recorded and judgment entered in accordance therewith. (Rec., p. 17.)

Judgment being entered and the judgment roll engrossed, the judgment was **read and signed** by the trial Judge in open Court on **January 20th,** 1905. This appears by the judgment roll as follows:

"Considering the **verdict of the jury** in this matter, and **that the demand of the plaintiff was proved,** the law and the evidence being in favor of said plaintiff:

"It is ordered, adjudged and decreed that the default herein entered on January 10th, 1905, be now confirmed and made final, and accordingly that there be judgment in favor of the plaintiff, Ephraim Simon, and against the defendant, Southern Railway Company, in the full sum of thirteen thousand three hundred and forty-eight ($13,348.00) dollars, with legal interest thereon from date of judgment until paid, and for costs.

"Judgment rendered in open Court January 16th, 1905.

"Judgment read and signed in open Court, January 20, 1905.

(Signed) "**W. B. Sommerville,**
"Judge."

(Rec. p. 17.)

All of the foregoing proceedings at law in the State Court are made to appear on the face of the record in this cause, as **exhibits to the bill of complaint.** (Rec., pp. 15-18.)

On February 6th, 1905, the Southern Railway Company, alleging itself to be a corporation, organized under the laws of the State of Virginia, and as such a citizen of said State, averring that it was "empowered to operate a line of railway in the State of Virginia, in the State of Mississippi and in other States, but not in the State of Louisiana," (Rec., p. 2), exhibited and filed its original bill of complaint in equity in the Circuit Court of the United States, for the Eastern District of Louisiana, against Ephraim Simon (now appellant), a resident of the City of New Orleans, State of Louisiana, and a citizen of said State. (Rec., pp. 1-7.) The sole object, end and purpose of this bill of complaint, as is shown upon the **face of the bill**, and upon the face of the **prayer** of said bill for relief, was as follows:

> "Your orator therefore prays that the said Ephraim Simon, who is plaintiff aforesaid, in said action at law, entitled 'Ephraim Simon vs. The Southern Railway Company,' No. 74,869, Civil District Court for the Parish of Orleans, his counsellors, attorneys, solicitors, or agents, **may be restrained by an injunction** issuing out of this Court, from **further proceedings** against your orator, **under the said suit and judgment**, or from issuing execution thereon, or attempting thereunder to seize any property, movable or immovable, of your orator, or **in any manner attempting to enforce the same.**" (Rec., p. 6.)

After formal prayer for process of **subpoena**, with waiver of respondent's oath, the bill proceeds to further specially pray:

> "That the **said injunction be made perpetual.**"
> (Rec., p. 7.)

The bill of complaint in this case is, therefore, plainly, on its face, an original, **independent injunction bill**, praying that "**the writ of injunction**" be "**granted**" by "**a Court of the United States, to stay proceedings in a Court of a State**" in the teeth of the literal terms of the Act of Congress of March 2nd, 1793, Chap. 22, Sec. 5, Section 720, Revised Statutes of the United States, and now Section 265 of the Judicial Code.

The averments will be fully analyzed and the contents of this injunction bill will be discussed in full hereinafter.

Upon the exhibiting of this bill of complaint on February 6th, 1905, with the **jurat** of A. B. Andrews, first vice-president of the Southern Railway Company, sworn to in Washington, D. C., of date January 31st. 1905, **couched in carefully guarded language** (Rec., p. 7), the United States Judge made the following order thereon.

> "Let the defendant show cause on Saturday, February 11th, at eleven o'clock A. M., why a preliminary injunction should not issue herein, and in the meantime, let a temporary restraining order issue herein, restraining and forbidding the said defendant from **proceeding** against complainant **under said suit and judgment**, or **attempting to enforce the same.**"
> (Rec., p. 7.)

After service of the restraining order and the order to show cause, the defendant duly entered his appearance to the bill, and filed a demurrer. (Rec., p. 24.) The rule for injunction was continued from time to time by the Court, and on June 7th, 1905, was heard and submitted on the **ex parte** affidavits and exhibits filed for complainant and defendant respectively. (Rec., pp. 81, 82, 83, 84.)

On June 9th, 1905, the District Judge holding the Circuit Court made the rule absolute, awarding the preliminary injunction, as prayed for by the bill. (Rec., pp. 85, 86, 87.)

On June 10th, 1905, the District Judge, **of his own motion**, made and entered an order appointing

> "Hon. Charles F. Buck to be Special Master in Chancery in this cause, with all of the powers possessed by masters in chancery. This cause is now referred to him and he is **specially authorized and directed** to hear and take all testimony and evidence in this cause and report the same to this Court, **together with his findings of law and fact on any and all matters which may come before him in this cause.**" (Rec., p. 88.)

The record shows that at the date of this order of reference to a master, the **demurrer, the only pleading filed by defendant, was still pending and undisposed of.** (See Record, p. 84.)

The demurrer, as appears by the record, was finally submitted to and overruled by the Court, on December 15th, 1906, and defendant was allowed time until the first Monday in February, 1907, in which to further plead or answer. (Rec., pp. 93-94.)

Defendant entered and filed his plea on February 5th, 1907, again challenging the **jurisdiction** of the Circuit Court, and its right and power to **sit in review on a judgment of the State Court.** (Rec., p. 94.)

The complainant filed a general replication to the plea on April 19th, 1907. (Rec., pp. 97-98.) The plea was on motion set down for hearing before the Court on May 27th, 1907, and on that date was heard and overruled by the District Judge holding the Circuit Court, who allowed the defendant further time to plead or answer until the first Monday in August, 1907. (Rec., pp. 98-99.)

A sworn answer, denying specifically any and all confederacy and all charges of fraud, set up in the bill, and denying specifically all matters of the bill, sought to be set up as equities, was filed on August 5th, 1907, under **protestation** and with **full reservation** of the matters set up in the demurrer and the plea. (Rec., pp. 99-107.)

On August 19th, 1907, complainant filed a general replication to the answer. (Rec., pp. 107-108.)

On November 11th, 1907, a rule for contempt was taken against the appellant, Simon, by the complainant, upon suggesting that Simon had disobeyed the injunction of the United States Circuit Court, by threatening to issue and by issuing execution upon his judgment obtained in the State Court. (Rec., pp. 109-114.)

To this rule Simon made respectful return, disclaiming any intentional or designed disrespect to the Court or its order, and after humbly and respectfully urging his rights vested in him under his judgment obtained in the State Court of the State of Louisiana, prayed to be discharged, upon suggesting that the trial Court's

order of injunction **was void for want of power and jurisdiction,** under the express terms of Section 720 of the Revised Statutes (now Section 265, Judicial Code) of the United States. (Rec., pp. 115, 116, 117.)

On November 15th, 1907, upon the hearing of the rule for contempt, the District Judge adjudged Simon guilty of contempt and imposed a **nominal** fine for disobedience of the order of injunction, and ordered Simon to stand committed for contempt and to be held by the United States marshal in custody until payment of the fine. (Rec., pp. 127-134.)

Simon thereupon applied, through his counsel, to the Supreme Court of the United States for a writ of **habeas corpus,** and a **certiorari,** and prayed to be released and discharged from custody. (Rec., pp. 134-142.)

Upon the final hearing and consideration of the matters set up by the appellant in his petition for **habeas corpus** and **certiorari,** the Supreme Court of the United States, at the October Term, 1907, handed down its opinion and decree, on January 26th, 1908, discharging the rule and denying the petition. **(Ex parte Simon, 208 U. S. 144.)** The grounds and reasons of this decision will be discussed in the argument on the assignments of error.

The special master to whom this cause had been referred, made up and filed on January 6th, 1910, a lengthy report of "his findings and conclusions of law and of fact, and upon any and all matters that came before him" and with it returned and made part thereof all of the testimony and evidence in the cause. (See terms

of order appointing Master, p. 88.) (See Master's Report, Rec., pp. 148-176.)

The "findings and conclusions of law and of fact" and of the "other matters that came before him," reported on by the master, will be discussed hereafter.

Exceptions were taken and filed to the report, by both the complainant and the defendant. The complainant excepted to the master's findings, only

> "in so far as the master finds and reports that the charges of fraud and bad faith, averred and indicated by the evidence submitted, are not sufficient to justify the annulment of the judgment of the State tribunal." (Rec., p. 277.)

The defendant filed elaborate and exhaustive detailed exceptions to the master's report, only in so far as it was prejudicial, both before the master himself, while he still held his report, and before the Circuit Court when the report was filed. (Rec., pp. 174-291.)

On February 4th, 1910, the defendant filed in the Circuit Court a formal motion to show cause why the order appointing the master should not be vacated and set aside, and why his report should not be stricken from the files of the Court on the ground that the Circuit Court, in the absence of a stipulated consent, entered into between the parties to said cause,, was without power or right to abdicate its authority or to impose or delegate any power upon a master in a cause of this nature, other than the bare authority to hear and take testimony and evidence of the respective parties to

the cause and to report such testimony and evidence to the Circuit Court, **without any findings of fact or conclusions of law.** (Rec., pp. 278-279- 291.)

On June 14, 1910, the cause came on to be heard before the Circuit Court on the motion to vacate the order appointing the master, and on the several and respective exceptions of the parties, complainant and defendant, to the master's report, and was argued before the Court and taken under advisement by the District Judge. (Rec., pp. 293-294.)

On November 25, 1910, the District Judge handed down and caused to be filed, a written opinion, disposing of the **entire cause,** holding that the Act No. 54 of 1904, of the Session Laws of Louisiana, providing for process of citation to a foreign corporation, **doing business in the State,** without any designated agent, through **service on the Secretary of State,** was unconstitutional, in that it was not due process of law, as guaranteed by the Constitution of the United States, and that the judgment of the State Court, based on **such service,** was consequently absolutely null and void. The District Judge thereupon held that it was unnecessary to pass upon the question raised by the order to vacate the master's report, and upon the questions raised by the exceptions to the report, and ordered a **FINAL DECREE** to be entered **perpetually enjoining the defendant,** as prayed for. (Rec., pp. 294-298.)

A **final decree, perpetually enjoining the defendant from enforcing the judgment** rendered by the State Court, was accordingly entered and signed on December 1st, 1910. (Rec., pp. 298-299.)

A motion of appeal, an assignment of errors and an appeal bond, approved by the Court, were thereupon filed by Simon in the Circuit Court, and an appeal from said final decree to the United States Circuit Court of Appeals for the Fifth Circuit was, thereupon, duly allowed. (Rec., pp. 299, 304.)

The Circuit Court of Appeals for the Fifth Circuit, having heard the appeal of Simon, handed down on March 5th, 1912, a memorandum opinion disposing of said appeal, in which the Court announced substantially the following conclusions:

1. That the Supreme Court of the United States had authoritatively decided the question of jurisdiction of the Circuit Court to entertain the bill of complaint of the Southern Railway Company, to stay proceedings in the State Court, on Simon's judgment, and that such decision was binding on the Circuit Court of Appeals until reversed.

> Citing Ex parte Simon, 208 U. S. 144;
> Marshall vs. Holmes, 141 U. S. 589;
> Gaines vs. Fuentes, 92 U. S., 10.

2. The Circuit Court of Appeals held that at the time Simon's petition was filed in the State Court, the Southern Railway Company was doing business in the Parish of Orleans, State of Louisiana.

3. That although the Southern Railway Company had not complied with the Louisiana Statute by naming or designating an agent within the State upon whom process of citation could be served, yet that service of process made upon the Assistant Secretary of State of Louisiana, as shown by the Sheriff's return in Simon's

case, was invalid and ineffective, and was not the method of service provided by the Louisiana Statute (Act 54 of 1904), requiring that service of citation must, in such case, be made upon the **Secretary of State**, and that, consequently, the judgment obtained by Simon in the State Court was absolutely void.

Thereupon, the Circuit Court of Appeals affirmed the judgment of the Circuit Court in this cause. (Rec., pp. 309-312.)

A petition for rehearing was denied on April 12th, 1912. (Rec., p. 326.)

The appellant thereupon filed his petition for appeal, his assignment of errors and his appeal bond, and an appeal was duly allowed in this cause to the Supreme Court of the United States. (Rec., pp. 327-328-329, 335.)

ASSIGNMENT OF ERRORS.

Ephraim Simon, the appellant in the above entitled cause, in connection with his petition for appeal herein, presents and files herewith his assignments of error, as to which matters and things he says that the decree entered herein on the 9th day of April, 1912, is erroneous in this, to-wit:

I.

That the Circuit Court of Appeals erred in holding that the Supreme Court of the United States authoritatively

decided in **Ex Parte Simon, 208 U. S.**, that the Circuit Court of the United States had jurisdiction of the suit of the **Southern Railway v. Ephriam Simon**, and that the decision was binding and conclusive upon the Circuit Court of Appeals. Whereas, it appears from the opinion of the Supreme Court of the United States and the judgment dismissing the relator's petition for habeas corpus, that the Court did not determine the question of jurisdiction, and indeed declined to decide the question of jurisdiction in that proceeding.

II.

That the Circuit Court of Appeals erred in affirming the jurisdiction of the Circuit Court of the United States **ratione materiae**, and by its decree perpetuating the injunction issued by said Court staying proceedings in the State Courts of Louisiana and by the operation of said writ of injunction arresting the execution of the judgment of the State Court upon a matter of mere form.

III.

That the Circuit Court of Appeals erred in affirming the jurisdiction of the Circuit Court of the United States, based on the averments of complainant's bill that the judgment of the State Court was in its effect and operation violative of Article (1) Section (8), Paragraph (3) of the Constitution of the United States and of Section

(1) of the Fourteenth Amendment to the Constitution of the United States; and the Court erred further when by its decree in this cause it recognized the power and authority of the Circuit Court of the United States to annul a judgment of the Civil District Court of the Parish of Orleans, State of Louisiana, a Court of concurrent jurisdiction with the said Circuit Court of the United States.

IV.

That the Circuit Court of Appeals erred in assuming and asserting jurisdiction to enjoin the execution of a judgment of the State Court or to stay proceedings therein, in violation of Section 720 of the Revised Statutes of the United States, and of the uniform jurisprudence of the Supreme Court of the United States thereunder.

V.

That the Circuit Court of Appeals erred in affirming the judgment of the Circuit Court of the United States, which by its judgment annuled the judgment rendered by the State Court in a case wherein the State Court had jurisdiction **ratione materiae et ratione personae.**

VI.

That the Circuit Court of Appeals erred in reviewing and passing upon the mode of service of process in the

State Court, when the question of the mode of service of process was not raised upon the pleadings in the case, and the decision of the Circuit Court of Appeals on this point was **ultra petitionem.**

VII.

That the Circuit Court of Appeals erred in asserting and exercising jurisdiction in a case wherein it was absolutely without jurisdiction **ratione materiae.**

VIII.

That the Circuit Court of Appeals erred in passing upon the mode of service of process in the State Court and in declaring the same void, when the State Court had determined by its assertion of jurisdiction and its judgment thereunder, that the mode of services of process was legal and effective; the action and decision of the Circuit Court of Appeals in this regard was in disregard of the Seventh Amendment to the Constitution of the United States.

IX.

That the Circuit Court of Appeals erred in holding, in disregard of the Constitution of the State of Louisiana, and of the Statute Law of this State, that service

upon the Assistant Secretary of State was not a good and valid service, inasmuch as under the Constitution and Statutes of this State, of which the Circuit Court of Appeals was duly advised, the duties of the Secretary of State, during the latter's absence, may be discharged by the Assistant Secretary of State, who is, under the Constitution and laws of Louisiana, **pro hac vice** the Secretary of State.

X.

That the Circuit Court of Appeals erred in not according recognition to the assignments of error on the plaintiff's appeal from the United States Circuit Court, and which assigned errors were pertinent to the determination of the questions submitted to said United States Circuit Court of Appeals on the appeal from the United States Circuit Court, and particularly so as to the first, second and seventh assignments as embodied in this record.

XI.

That the Circuit Court of Appeals erred in maintaining the bill of complaint and in perpetuating the injunction herein, because the averments made by complainant for the purpose of seizing the equitable jurisdiction of the Court were merely colorable; the Court found on the

merits, first, that the defendant, in obtaining his judgment was free from the charge of fraud or ill-practices, and secondly, that the Southern Railway Company was doing business in Louisiana at the time Simon instituted his suit in the State Court against the company.

XII.

That the Circuit Court of Appeals erred in maintaining the complainant's bill and in perpetuating the injunction herein, because the bill having been stripped of all equitable grounds on the merits, all the basic facts having been found in defendant's (Simon) favor, the jurisdiction of the United States Circuit Court, sitting as a Court of Equity, was left barren, and the bill of complaint should have been dismissed.

XIII.

That the Circuit Court of Appeals erred in maintaining complainant's bill and in perpetuating the injunction herein, because a Court of Equity, State or Federal, is without power by its writ of injunction to enjoin a judgment of a Court of concurrent jurisdiction, merely because said Court differs in its interpretation of a Statute of a State; in this case in the interpretation as to the mode of service of process, namely, whether the service, under Act No. 54 of 1904 of the State of Louisiana, was

made upon the Secretary of State or his assistant—purely a legal question.

XIV.

That the Circuit Court of Appeals erred in maintaining the bill of complaint and in perpetuating the injunction herein, when it was demonstrated that no right of the complainant under the Federal Constitution was infracted or denied, and complainant's remedy at law in the State Court was clear, plain and adequate. (1) By action of appeal to the Supreme Court on the face of the service and citation, with the right in the event of an adverse decision, to a writ of error to the Supreme Court of the United States. (2) By an action of nullity in the State Court under Articles 605 and 606, Code of Practice of Louisiana, and then under Section 709 of the Revised Statutes of the United States, to the Supreme Court of the United States.

XV.

That the Circuit Court of Appeals erred in maintaining the bill of complaint and in perpetuating the injunction herein, because said Circuit Court was without jurisdiction **ratione materiae** to revise or review the judgment of the State Court, the State Court having decided that the mode of citation was valid and effective under the law of Louisiana.

XVI.

That the Circuit Court of Appeals erred in maintaining the bill of complaint and in perpetuating the injunction herein, because it has attempted to re-examine the question of fact tried and decided by a jury in an action at law in the State Court, which is contrary to the Seventh Amendment to the Constitution of the United States.

XVII.

That the Circuit Court of Appeals erred in maintaining the bill of complaint and in perpetuating the injunction herein, in that its judgment has in effect annulled and set aside the judgment of a State Court, in contravention of Article (4). Section (1) of the Constitution of the United States wherein the Courts of the United States are bound to give the judgments of the State Courts the same faith and credit that the Courts of one State are bound to give to the judgments of Courts of sister States.

XVIII.

And appellant assigns other errors apparent upon the face of the record.

Wherefore, appellant prays that said decree herein complained of may be reversed, and that appellant may have an adjudication and decree in his favor, in accordance with law and equity, and as herein specified.

ARGUMENT.

The first, second, third, fourth, fifth, sixth, seventh, tenth, thirteenth and fourteenth assignments of error will now be discussed.

I.

The fundamental and controlling question in this case is the question of jurisdiction: **Did the Circuit Court of the United States for the Eastern District of Louisiana have jurisdiction to entertain the bill and grant the only relief prayed for in said bill, to-wit, a writ of injunction to stay proceedings in a Court of a State? And did the Circuit Court of Appeals for the Fifth Circuit err in affirming the final decree of the Circuit Court maintaining such jurisdiction and granting such relief?**

The question of the jurisdiction of the Circuit Court in the cause at bar was raised in the trial Court below by demurrer, by plea and by the sworn answer. A discussion of the demurrer will show all of the grounds upon which the complainant sought to vest jurisdiction in equity, by its **original and independent bill**, exhibited in the United States Circuit Court. We, therefore, discuss, under the following two **sub-headings**, the jurisdiction, as it appears on the **face** of the bill, with the exhibits thereto, and then the bill on its **merits**.

Argument on the Demurrer.

The bill seeks to state a case in equity in the Federal Court on two grounds: First, the grounds of fraud, accident and mistake; second, the commerce clause of the Federal Constitution, which, it is averred, the State of Louisiana had violated by the terms of Act No. 54 of 1904, in seeking to regulate **interstate commerce**, if said statute be held to apply to a **foreign corporation, not** doing business in the State, and having no agent therein. This last ground has at no time been insisted upon by complainant, and is therefore to be considered as waived.

The bill does not aver that the Act 54 of 1904, of the Louisiana Legislature **(see Appendix)** is **unconditionally** unconstitutional. Nor does it aver that service thereunder upon a foreign corporation, **doing business in the State,** without having complied with said act—in failing to designate an agent for service of citation—would be violative of either the commerce clause or the Fourteenth Amendment to the Constitution of the United States. The **gravamen** of the bill is that the complainant was **not,** as a matter of fact, or as a matter of law, **doing business within the State of Louisiana.** The bill **does not charge** that the service of process is void, because made in this case on the Assistant Secretary of State. On the contrary, paragraphs 5, 6, 9 and 11 of the bill make it plain that the result sought to be reached by Simon, by his proceeding in the State Court—to wit, legal service on the corporation, under Act 54 of 1904—would

have been the same, whether service of citation had been made upon the Secretary of State, or upon the Assistant Secretary of State. The bill, on its face, plainly implies that, as matter of State law, service on the one was tantamount, in law, to service on the other. In another part of this brief this will be demonstrated to be the law of Louisiana under the Constitution, the Statute and the Jurisprudence. The record shows not only affirmatively, but with certainty, that the query or suggestion that service made upon the Assistant Secretary of State was not a compliance with the State statute—or that it was not due process of law under the Fourteenth Amendment to the Constitution of the United States—was a point raised by the master for the first time, in the rough draft of his report (Rec., p. 175)—a conclusion about which the master himself seems to have become doubtful, as a matter of law, when the report was ready to be filed in its completed form. (Rec., p. 163-164-165.) The District Judge—who dealt incidentally with the master's report, and who professed to treat it as "merely advisory"—in reaching the final decree appears to have disregarded the master's views and conclusions on this point.. (Rec., pp. 294-295-296.)

The Circuit Court of Appeals adopted the master's tentative conclusions as to the mode of service under Act 54 of 1904—which the master admits was a pure question of the interpretation of State law—holding that service on the Assistant Secretary of State was not tantamount in the law of the State to service on the Secretary of State, and overlooking the fact that this sole ground of its decision, was not only a mere question of

State law, arising on the face of the record of the State Court, but was ultra petitionem, of this bill of complaint, as both the master found and as the District Judge practically admitted and decided. (Rec., p. 295.)

It is well established that an injunction bill in the United States Courts, or in any Court of equity, does not lie to review mere errors of law of State Courts.

Nongue v. Clapp, 101 U. S., 551-554.

In the case at bar, the Circuit Court of Appeals pitched its decision solely upon the mode of service in this case, which was apparent on the face of the record in the State Court in Simon's case, holding contrary to the express decision of the State Court, that the service as actually made upon the Assistant Secretary of State, instead of the Secretary of State, who was absent at the time of service, was absolutely void under the State law.

Taking up now the so-called equitable matters of the bill, we proceed to examine its averments of fact and its conclusions.

THE BILL DOES NOT CHARGE EXTRINSIC OR COLLATERAL FRAUD.

This bill neither charges nor implies in any line, phrase, paragraph or set of words, any fraud or collusion committed by Simon in the process or method of service of citation in the suit in the State Court. It is not charged, hinted at or suggested, by any language in the bill, that Simon colluded with any official of the State, or of the Court, or with anyone else, in making or in seeking to

have service made under the Louisiana statute. Nor does the bill charge that Simon knew, when he filed his suit and sought to get service under Act 54 of 1904, that the complainant, a foreign corporation, was not doing business within the State, or that he practiced any fraud upon the Court in falsely claiming or pretending that the complainant corporation was doing business within the State. The statement, therefore, in the opinion of this Court in Ex Parte Simon, 208 U. S., 144, to the effect that the bill of the Southern Railway Company in the case at bar, "implies, at least, that the fictitious service" in Simon's case in the State Court "was made with deliberate fraud," we have been unable to justify by fair analysis of the averments of the bill. Nor does the bill contain any averment of fact tending to show—nor does it imply—any violation of an agreement between Simon and the Southern Railway Company, to the purport or effect that Simon would not bring suit; nor that he would not take judgment in such suit; nor that he would not seek to execute the judgment. Nor does the bill aver or set up any extrinsic or collateral act whatever, as having been done by Simon, that would make it inequitable for Simon to execute the judgment. The vague, indefinite and legally unmeaning conclusions of fraud, are, by the terms of the bill, limited and confined specifically to the alleged "surreptitious" filing of the suit, (a meaningless allegation) to the alleged "unconscionable" amount of Simon's demand, to the items specified as damages in his petition, which are said to be "not recoverable at law," and to the alleged "fraudu-

lently procuring and causing to be entered a verdict in the amount claimed in the petition," and to the alleged "subterfuge and fraud" of Simon in claiming and adducing "false testimony" to the effect that he had sustained damages in the amount sued for.

A thorough analysis of the bill will show that the statements in the foregoing sentence, comprehend and embrace everything that could be termed a fraud allegation in this bill. Under the well-settled authorities—there being no definite specification, no clear and distinct statements of external facts, but only mere epithets, invectives and highly colored adjectives or bare conclusions—a bill couched in such terms is demurrable, because such matters, not being well pleaded, are not admitted by the demurrer to be true.

Kent vs. Canal Co., 144 U. S. 91.
Fogg vs. Blair, 139 U. S. 127.
Life Association vs. Lohmiller, 74 Fed. 23.
Trust Co. vs. Folsom (opinion by Justice Lurton), 75 Fed. 929.

Moreover, all of the foregoing matters, characterized by the epithets "surreptitious," "fraud," "fraudulent," "subterfuge" and "unconscionable," are intrinsic matters, on their face and were tried and passed upon by the jury, and were foreclosed by the verdict of the jury and the judgment roll of the State Court, as the bill shows. It is now, and, for many years past, has been the settled doctrine of the courts of equity, that the character or species of so-called frauds, or of so-called fraudulent acts, of which a Court of equity will take cognizance, in

giving relief from a judgment or proceeding at law, are only such matters as are **extrinsic and collateral.**

U. S. vs. Throckmorton, 98 U. S., pp. 61, 65, 66, 67, 68, and authorities there cited.

U. S. vs. Flint et al., 4 Sawy. Cir. Ct. 42; S. C. 25 Fed. Cas., p. 1107.

Equally unfounded is the ground of attack that the damages claimed were not legally allowable. The mere fact that a question might arise with respect to the rule of damages as to which **Courts might differ,** does not warrant the institution of a suit in one Court to set aside a judgment obtained in another Court, founded in part on the application of a **debatable rule** of damages or evidence.

Simon's claim in the State Court and its allowance are amply justified by so excellent an authority as **4 Southerland on Damages (3rd Ed.) Section 1246,** and the authorities there cited.

It is certain that the complainant, on the face of the bill, under all of the authorities, has made no showing for relief in a Court of equity, upon the socalled fraud averments nor has it even made any showing by such averments as are set up in this bill, for the statutory action of **nullity,** under the terms of Article 607 of the Louisiana Code of Practice. We have been unable to find a **single case in the Louisiana jurisprudence holding that an averment to the mere effect that false testimony** was the basis of the **quantum or amount of a judgment complained of,** is ground for an action to **annul** such judgment in the

same Court which rendered the judgment complained of, under the Louisiana practice.

See McMicken vs. Millaudon, 2 La. 180.

Nor will there be found any such decision in the jurisprudence of this Court maintaining a bill in equity to impeach a judgment at law upon the general charge of false swearing.

The only other shred, vestige or pretense of a ground on which it is attempted to base equitable jurisdiction in the entire bill in the case at bar, is the averment that the complainant was prevented and precluded from making defense to Simon's suit in the State Court, by the alleged accident or failure to receive notice of the pendency of the suit and of Simon's demand therein, by service of citation upon the **Secretary of State** (Rec., p. 5, paragraph 11), and the further averment that this so-called accident, failure or mistake was "unmixed with any fault or negligence of complainant." These averments are mere conclusions of law. They have no meaning or force whatever, **in this case**, unless they are taken in connection with the averments that **complainant was a foreign corporation, not doing business within the State, and having no agent therein**, and unless **averred in connection** with some **extrinsic fraudulent act on the part of Simon, in deceiving or tricking the Court**, as to the mode of service employed or adopted by Simon, or of **concealing or causing to be concealed** from the Southern Railway Company, notice of the filing of suit or notice of the service of citation on the Secretary of State, which is not the case here. **No such fraudulent act of Simon is charged or implied in this bill.** The averments of the

bill as to doing business within the State are contradicted by the exhibits annexed to the bill, to-wit: The face of Simon's petition, where he distinctly avers that the Southern Railway Company, a foreign corporation, is doing business in the State, without having complied with the law, and by the verdict of the jury and the judgment thereon, from which it appears that such matter of fact set up by Simon in his petition was presented to, tried by and necessarily involved in, both the verdict and the judgment of the State Court, which expressly found "that the demand of the plaintiff was proved." The legal purport of these exhibits and the facts which they involve and embody, must therefore be read into this bill and treated as facts stated by the bill, or as admitted by the bill, since they are not traversed or denied by any appropriate language or averment in the bill—there being, as above stated, no averment in the bill to the purport or effect that Simon, by any act whatever, committed any fraud upon the trial Court, or upon the complainant, in fraudulently procuring the State Court to take jurisdiction of a case where Simon knew that the Court had no jurisdiction, either as matter of fact or as matter of law, or by concealing from the Southern Railway Company, by collusion, the fact that citation had issued and had been served on the Secretary of State, or was on file in his office.

These matters were, therefore, also intrinsic in the case at bar, since they were, of necessity, facts tried by a jury in the State Court, or were pure conclusions drawn by the State law therefrom, and were the basis and the only basis of the jurisdiction of the Civil District Court

(the State Court) in Simon's case, as is shown **on the face of the petition filed by Simon in the State Court.** (See exhibits to the bill, Rec., pp. 6-14.)

If complainant, as a matter of fact, **was doing business in the State** (which is vaguely denied in its bill), and which the jury found, **as a matter of fact,** as the exhibit to the bill shows, and if complainant **had no designated agent within the State, selected by it for the special function of service of citation** (which the bill admits), and which the jury also found, as the bill further shows, then complainant **was amenable to the State statute of Louisiana** (Act 54 of 1904), by the express terms of the Statute, and the jurisdiction of the Civil District Court **attached,** both as a matter of fact and as a matter of law, and **these very facts** were presented to, were tried, and were found by, the jury against complainant, by the very terms of the verdict and the judgment of the State Court, when read in the light of the State statute, as the bill and exhibits show on their face. The failure of the complainant, a **foreign corporation doing business within the State,** to select a specially designated agent for service of citation, was **its own negligence, or deliberate disregard** of the State law, and made the State law operate **ipso facto,** whereby the State **selected, with the legally presumed consent of the Southern Railway Company, the Secretary of State** as the Special officer or agent of the corporation upon whom service of citation might be made, just as though the agent selected by the State were **the proper officer** selected by the corporation itself. So that, up to this point, the **whole bill and all of its averments and charges,** are matters **wholly intrinsic**—that is

to say, they were, as shown by the bill, or as necessary conclusions of law drawn therefrom, necessarily involved in, and were necessarily tried and passed on by the jury and by the judgment of the State Court. This is the whole case as presented **on the face of the bill of complaint, under the indefinite fraud allegations.** The bill, therefore, does not state any case of "deliberate fraud," for the intervention of a Court of equity as a matter of **equitable jurisdiction.**

What Did Ex Parte Simon, 208 U. S., 144, Authoritatively Decide?

Ex parte Simon, 208 U. S. 144, does not purport to **"authoritatively decide"** that the Circuit Court had jurisdiction of the bill as a Court of Equity in the case at bar. All that can be fairly said to have been decided in **Ex parte Simon** is that a proceeding by **habeas corpus** was not the proper proceeding **to test the jurisdiction of** the Circuit Court in a case where a merely nominal fine had been imposed by the Circuit Court for failure to obey the preliminary order of the Court. This Court merely first **"assumed"** that the Circuit Court had jurisdiction in **Ex parte Simon,** and then **argued** that the jurisdiction **existed** at least for the purposes of the **preliminary** order, and then **concluded** with the suggestion that as there was enough alleged to amend by, the bill could be amended so as to **"give jurisdiction to the Circuit. Court."** (P. 148.) The sole precedent or authority cited for the "assumed" jurisdiction is **"Marshall vs. Holmes, 141 U. S. 589, and the earlier cases cited**

in that case." We respectfully submit that when fairly and fully analyzed, neither **Marshall vs. Holmes**, nor **Barrow vs. Hunton, 99 U. S. 80, nor Gaines vs. Fuentes, 92 U. S. 10**, were authority for the **issuing of the injunction**, which was the sole matter in contest in **Ex parte Simon**, as being without the jurisdiction of the Circuit Court, under the Revised Statutes, Sec. 720. Nor was **Johnson vs. Waters, 111 U. S. 640**, which was a creditors bill; nor **Arrowsmith vs. Gleason, 129 U. S. 86**, which was a bill brought by an infant to set aside a fraudulent sale of the infant's land, authority for the **issuance of an injunction** to stay proceedings in the State Court, notwithstanding the prohibitory terms of **Section 720, U. S. Rev. Stat. (Sec. 265, Judicial Code)**. The **power to issue the injunction, the only relief prayed for, and the power to punish for contempt, were the vital matters involved in** Ex Parte Simon, and these **grave questions**, this Court, upon well settled authority and ample precedent, **refused to adjudge upon Habeas Corpus**, in advance of full and regular hearing.

In none of the cases cited in Marshall vs. Holmes was any injunction issued by the Circuit Court of the United States. Nor did any of these cases properly involve the **power** of the Circuit Court to issue an injunction. **Gaines vs. Fuentes, Barrow vs. Hunton** and **Marshall vs. Holmes were all Louisiana removal cases, and the only Federal question fairly presented for decision in these cases, and actually decided, as a Federal question, was the right of removal. In Marshall vs. Holmes there was no removal** to the Federal Court. In **Barrow vs. Hunton, 99 U. S., 80,** the case was **remanded** to the State Court, **follow-**

ing the State Court decision, which held that the case was **not removable.** See **Goodrich vs. Hunton, 29 La. An.,** 372. The case of **Gaines vc. Fuentes, 92 U. S., 10,** is **sui generis,** and its **removability** (the only Federal question involved) was seriously doubted. See dissenting opinions of Mr. Justice Bradley, Chief Justice Waite, and Mr. Justice Swayne. See also **Fuentes vs. Gaines, 25 La. An., 80, 95,** and **Goodrich vs. Hunton** where the State Court said that **Fuentes vs. Gaines** was not a removable controversy by its very **nature,** since it was a **probate** matter and was an **ancillary** proceeding in the probate Court. The two State Courts, both the trial Court and the Court of Appeal of Louisiana, **held** that the case of **Marshall vs. Holmes** was **not removable,** and, thereupon, the two State Courts decided the case **on its merits,** and denied Mrs. Marshall relief in her action of nullity. On writ of error to this Court it was held that the suit or controversy presented by Mrs. Marshall's equitable action of nullity **was removable,** since she was a citizen of the State of New York, and the defendants were citizens of Louisiana, and, there being diversity of citizenship, the case should have been removed, and, hence, that all of the orders and decrees made by the State Court, after the petition for removal was filed, were properly without the jurisdiction of the State Courts. Thereupon, the decision of the Louisiana State Court of Appeal was reversed. It may be doubted whether **Marshall vs. Holmes** is now authority even on the question of the right of removal, since the decision of this Court in the case of **Illinois Central R. R. Co. vs. Shegog, 215 U. S. 308,** where

the right of removal was denied by this Court after two Courts of the State of Kentucky had passed on the right of removal and had decided the case on its merits, although the railroad company had actually removed the case to the Federal Court and although the Federal Court had rendered a judgment upon the verdict of a jury therein, before the Court of Appeals of Kentucky had acted. See also, Railroad Company vs. Street, 217 U. S., 599. However, Marshall vs. Holmes did not involve any question of the jurisdiction of the Federal Court to make any order after removal, for the mere reason that the case was not removed. Hence, everything that was said in that case about what the Federal Court would have had power to do, or what it ought to do after the case was removed, was merely obiter dictum, and, besides, in Marshall vs. Holmes, the petition for removal was not filed until after the State trial Court had issued a preliminary injunction, which is usually coupled, in the Louisiana practice, with an action of nullity. So that, upon removal, if the trial Court had made the order of removal, there would have been no necessity for the Federal Court to issue any injunction to stay proceedings on the twenty-three judgments recovered by Mayer against Mrs. Marshall in the State Court.

See Watson vs. Bondurant, 103 U. S., 281, 287.

Ex parte Simon also "assumes" that an injunction was issued by the Circuit Court of the United States in Marshall vs. Holmes, an assumption that is not borne out by the report of the case.

Nor does **Ex parte Simon** "authoritatively decide" that the bill in this case, warrants the issuance of an injunction to stay proceedings in a State Court or that it stated a case for equitable intervention. The Court expressly **declined** to determine whether the bill would be "**good or bad on demurrer.**" All it **intimates** is that there were efforts and attempts to allege jurisdiction in equity which **might** be sufficient to state a **case** in equity if the bill were properly **amended**, so as to state a case of jurisdiction, and that there was "at least **color of right**" for the preliminary injunction, and that there would be **time enough** to discuss the **merits of the bill** if the case came here after **final decree**. This, we submit, is the sum and substance of all that is "decided" in **Ex parte Simon**, and all that it **purports** to decide. The plain hint to the complainant that the bill ought to be amended, so as to state, if possible, a clear and distinct case "to give the Circuit Court jurisdiction," seems to have been entirely lost on complainant, because it ignored this hint in failing to amend its bill, though it had ample time and opportunity to do so. Hence, it is fair to conclude that it was **not possible** for the complainant to truthfully state its case, for **jurisdiction of the Circuit Court**, in any fuller or better terms than it has done by its original bill.

THE FEDERAL STATUTE BEING A PROHIBITORY STATUTE IS A CONCLUSIVE BAR TO FEDERAL JURISDICTION.

We have shown above that the bill is plainly demurrable **as it stands**, viewed simply **as a case in equity**. We now

proceed to show that it is demurrable merely because it is an original independent injunction bill, whose sole purpose and whose sole prayer is to "stay proceedings in a State Court" by a writ of injunction "granted" "by a Court of the United States." There being no pretense that this is a proceeding in bankruptcy, nor a case where the Circuit Court issued an injunction in aid of its prior jurisdiction, nor a case of which the Circuit Court had exclusive jurisdiction, it does not matter whether the State Court, as a matter of law, or as a matter of fact, had jurisdiction over the parties in the suit at law in the State Court; whether its proceedings were voidable or void for fraud, or for want of form; nor whether or not such proceedings were the result of error of law or error of fact. The writ of injunction issuing from a Court of the United States, a Court of concurrent jurisdiction with the State Court, is not the proper procedure UNDER THE LAW OF THE LAND, by which to test the power of the State Court, or its proceedings thereunder, or its jurisdiction to render the judgment complained of, or to stay proceedings therein or thereupon. There is a long line of emphatic and unequivocal decisions by this high tribunal, maintaining this proposition, from the earliest times down to the close of the last term of this Court, without a single break—in nearly every conceivable kind of a case. And we submit that, under these conclusive authorities, the injunction granted by the Court below upon this bill cannot be sustained, although in an appropriate action the Federal Court would have had jurisdiction by virtue of the diversity of citizenship, to grant equitable relief from a fraudulently obtained judgment.

See **Johnson vs. Watters, 111 U. S., 640; Arrowsmith vs. Gleason, 129 U. S., 86.** This Court has never countenanced the issuance of an injunction to stay proceedings in a State Court, except where the Federal Court's jurisdiction first attached, and then for its protection, or where the Federal Courts were invested by some act of Congress with exclusive jurisdiction.

Diggs vs. Walcott, 4 Cranch, 179.
Peck vs. Jenness, 7 How. 612.
Randall vs. Howard, 2 Black, 585.
Watson vs. Jones, 13 Wall. 679.
Riggs vs. Johnson County, 6 Wall. 195.
Carpenter vs. Haines, 91 U. S., 254.
Dial vs. Reynolds, 96 U. S. 340.
Watson vs. Bondurant, 103 U. S. 281-287.
Sergeant vs. Helton, 115 U. S. 348.
Lawrence vs. Railroad, 121 U. S. 634-636.
Moran vs. Sturgess, 154 U. S. 268.
In re Chetwood, 165 U. S. 443.
Bank vs. Stevens, 169 U. S., 432.
Harkrader vs. Wadley, 172 U. S. 170.
Chapman vs. Brewer, 114 U. S. 158.
Illinois Central Railroad Company vs. Sheegog, 217 U. S. 599.
Hull vs Burr, decided at the October Term, 1913.
See, also, Ewing vs. City of St. Louis, 5 Wall. 413.
Nougue vs. Clapp, 101 U. S. 551.

Diggs vs. Walcott, 4 Cranch, 179, was a suit in chancery, brought in a State Court, to enjoin, on the ground of extrinsic and collateral fraud, a judgment recovered in a suit at law, in the State Court. The suit in chancery was removed from the State Court into the Circuit

Court of the United States, **where an injunction was issued,** in accordance with the bill. An appeal was taken from the Circuit Court to the Supreme Court of the United States, where it appears that the cause was argued upon its merits, but, says the report, "The Court being of opinion that a Circuit Court of the United States **had not jurisdiction to enjoin proceedings in a State Court,**" the decree was reversed.

In **Peck vs. Jenness, 7 How. 612-625,** this Court, speaking by Mr. Justice Grier, said:

> "The act of Congress of the 2nd of March, 1793, Chap. 66, Sec. 5, declares that a writ of injunction shall not be granted 'to stay proceedings in any Court of a State.'
>
> "In the case of **Diggs vs. Walcott, 4 Cranch, 179,** the decree of the Circuit Court had enjoined **the defendant** from proceeding in a suit pending in a State Court, and this Court reversed the decree, because it **had no jurisdiction to enjoin proceedings in a State Court.** It follows, therefore, that the District Court had no supervisory power over the State Court, either by injunction or the more summary method pursued in this case, unless it has been conferred by the Bankrupt Act."

In the case of **Watson vs. Jones, 13 Wall., 679,** Mr. Justice Miller, speaking for the majority of the Court, said (p. 719):

> "And the act of Congress of March 2, 1793, as construed in the cases of **Diggs vs. Walcott** and **Peck vs. Jeuness,** is **equally conclusive** against

any injunction from the Circuit Court forbidding the defendants to take the possession which the unexecuted decree of the Chancery Court requires the marshal to deliver to them."

The Judges who dissented in this case did not rest their dissent on the ground that the Circuit Court of the United States **had power** to issue an injunction to stay proceedings in the State Court. On the contrary, Mr. Justice Clifford, speaking for himself, as well as for Mr. Justice Davis, who concurred in his dissent, p. 737, said:

"I am of the opinion that the Circuit Court had no jurisdiction to hear and determine the matter in controversy, as there were two courts of common law exercising the same jurisdiction between the same parties in respect to the same subject-matter within the same territorial limits and governed by the same laws. * * * State Courts and Circuit Courts in such cases are Courts of concurrent and co-ordinate jurisdiction, in respect to which the principle is that 'whenever property has been seized by an officer of the Court, or put in his custody by the process of the Court, the property will be considered as in the custody of the Court and under its control for the time being, and that no other Court has a right to interfere with that possession unless it be some Court which may have a **direct supervisory control** over the Court whose process has first taken possession, or some **superior jurisdiction** in the premises.' **Buck vs. Colbath, 3 Wall. 341.** Decided cases asserting that principle and enforcing it, are **very numerous** in the reported decisions of this Court, and also in

the reported decisions of other Courts of the highest respectability."

Citing Hagan vs. Lucas, 10 Peters, 400.
Taylor vs. Carryl, 20 How. 594.
Freeman vs. Howe, 24 How. 500.
Payne vs. Drew, 4 East. 523.
Peck vs. Jenness, 7 How. 612.
Evelyn vs. Lewis, 3 Hare, 472.
Noe vs. Gibson, 7 Page, 513.
Russell vs. East Anglian Ry. Co., 3 McNaughton & Gordon, 104.

In **Carpenter vs. Haines, 91 U. S. 254,** Mr. Justice Bradley, in delivering the unanimous opinion of the Court, said:

"A mere statement of the bill is sufficient to show that it cannot be sustained. Whilst it undoubtedly presents **some matters of equitable consideration,** they are so mixed up with others of a different character, or which cannot be entertained by the Circuit Court of the United States, and which constitute the main object and purpose of the suit, as to make the bill essentially **bad on demurrer.** In the first place, **the great object of the suit is to enjoin and stop litigation in the State Courts and to bring all the litigated questions before the Circuit Court.** This is one of the things which the **Federal Courts are expressly prohibited from doing.** By the act of March 2nd, 1793, it was declared that a writ of injunction shall not be granted to stay proceedings in a State Court. This prohibition is repeated in Section 720 of the Revised Statutes, and extends to **all cases except where otherwise provided by the bankrupt law.**

This objection alone is sufficient ground for sustaining the demurrer to the bill."

In **Dial vs. Reynolds, 96 U. S. 340,** Mr. Justice Swayne, speaking for the whole Court, said:

> "The gravamen of what is desired as to Reynolds, is an injunction to prevent his proceeding at law in the State Court. Without this all else is of no account. Any other remedy would be unavailing. Such an injunction, except under the Bankrupt Act, no Court of the United States can grant. With this exception it is expressly forbidden by law. **Act of March 2nd, 1793, Sec. 5, 1 Stat. 334. Rev. Stat., Sec. 720; Diggs vs. Wolcott, 4 Cranch, 179; Peck et al., vs. Jenness et al., 7 How., 612; Watson vs. Jones, 13 Wall. 679."**

In **Sargent vs. Helton, et al., supra,** where a sale of lands of a **bankrupt estate** had been made and confirmed by the order of the Bankruptcy Court, and the lands had been conveyed by the assignee in bankruptcy, it was held that the Circuit Court of the United States was without jurisdiction at the suit of the **purchaser** to enjoin **a sale of the same lands** about to be made on the order of a State Court. In this case Mr. Justice Woods, delivering the unanimous opinion of the Court, said:

> "The sole purpose of the bill in this case was to restrain the execution of an order of the Circuit Court for the County of Escambia, a Court of the State of Alabama, and **no relief which, upon the averments of the bill, this Court could grant would be effectual without the writ of injunction prayed for.** The Circuit Court of the United States was,

therefore, **deprived of power** by the section just quoted, to protect the rights of the plaintiff, unless the writ of injunction was authorized by the law relating to proceedings in bankruptcy. **Haynes vs. Carpenter, 91 U. S. 254; Dial vs. Reynolds, 96 U. S. 340.** In a timely suit brought by the **assignee in bankruptcy**, there is no doubt that upon a **proper showing** the Circuit Court might have enjoined proceedings in the **attachment suits** in the State Court. This is the express ruling in **Chapman vs. Brewer, 114 U. S., 158.** But the plaintiff in this case is **not** the assignee in bankruptcy. Sullivan, the transferee of Sargent, the vendee at the bankruptcy sale, was the **real** plaintiff, and the only party who at the final hearing asked for the injunction. The question, therefore, is: Does any law relating to proceedings in bankruptcy authorize an injunction at the instance of a purchaser of property at the bankrupt sale, or his vendee, to stay proceedings in a State Court? There is no act of Congress expressly authorizing a Circuit Court of the United States to restrain by injunction, **even at the suit of an assignee in bankruptcy, proceedings in a State Court.**"

The Court, then, quoting from **Chapman vs. Brewer, said:**

"The case makes it clear that the injunction to stay proceedings in a State Court is only allowed by the statute for the purpose of **aiding the assignee in bankruptcy to discharge his duty** and of **protecting the property of the bankrupt estate for the equitable distribution among the creditors.** But there is no act of Congress from which can be inferred authority to a Court of the United

States to issue an injunction to restrain proceedings of a State Court at the instance of a purchaser at a bankruptcy sale or of his vendee."

In distinguishing the case of **Dietsch vs. Huidekoper, 103 U. S. 494**, the Court said that case

"merely decided that a Court of the United States **could enforce its own judgment** in a **replevin suit removed from a State Court** by enjoining the defeated parties from proceeding on the replevin bond **in the Court from which the cause had been removed**, the condition of the bond having been **satisfied** by the judgment of the Federal Court in favor of the obligor. The Court further held that the bill filed for the purpose of restraining the defendant was merely **ancillary** to the replevin suit, its object being to secure to the defendant therein the fruits of his judgment. The authority cited does not **tend to sustain** the jurisdiction of the Court in this case." (Black letters ours.)

In **Lawrence vs. Railroad Company, 121 U. S. 634**, Chief Justice Waite quoted the following language from **Bondurant vs. Watson (supra)**:

"If Watson had filed the petition for injunction in the State Court, and, **before it was allowed**, had petitioned for a removal of the cause to the Circuit Court with the design of applying to that Court for his injunction, the objection to the right of removal would have force. **That would have been an evasion of the statute.**"

The Chief Justice, after making the foregoing quotation, then proceeds to say:

"Such clearly **is this case**. The petition for removal was filed by the party who brought the **suit**,

> and there is nothing whatever in the record to show that the injunction she asked for was ever granted by the Court or by any Judge thereof prior to the removal. * * * Under the circumstances, therefore, the case is to be treated as having been taken to the Circuit Court to get an injunction, and not after one had been granted. This we have no hesitation in saying cannot be done, and without deciding whether, under any circumstances, a proceeding such as this was in the State Court can be removed to a Circuit Court, we affirm the order to remand."

Nearly all of the above authorities are cited and referred to as the undoubted law in the case of **Hull vs. Burr**, decided at the last term. See Advance Opinions, United States Supreme Court, October Term, 1913, decided June 22, 1914. Attention is called to the striking difference between the vague and general terms of the prayer of the bill in the **Hull case** and the pointed and specific terms of the prayer of the bill in the case at bar. In the **Hull case**, Mr. Justice Pitney, in speaking of the prayer, said:

> "As already mentioned, the specific prayer is that defendants may be restrained from asserting or claiming as trustee in bankruptcy in 'any Court or place any right, title or interest in' the property. There is a prayer for general relief, but it was pointed out by the Circuit Court of Appeals (207 Fed. 534-544) that no right to relief other than by way of an injunction was brought to the attention of the District Court or of the Court of Appeals upon the hearing. The general prayer should, therefore, be treated as abandoned."

Dealing with the merits of the case, in respect to the relief asked, the opinion then proceeds:

> "So far as the action already pending in the Florida Court of equity is concerned, the case is clearly within Section 720, **Rev. Stat., U. S. Comp. Stat., 1901, p. 581, Sec. 265 Judicial Code; 36 Stat. at L. 1162, Chap. 231; U. S. Comp. Stat. Supp. 1911, p. 236.** 'The writ of injunction shall not be granted by any Court of the United States to stay proceedings in any Court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.' • • • It is quite evident that the injunction sought by the present complainant is not one authorized by the Bankruptcy Act. The prohibition against injunction to stay proceedings in State Courts originated in the Acts of March 2nd, 1793, and has been constantly observed by the Court."
>
> **Citing Diggs vs. Wolcott, and the other authorities above referred to.**

To the suggestion that the term "any Court" in the prayer of the bill might refer to or include other Federal Courts, he said:

> "It is sufficient to say that the bill is devoid of any showing that defendants are asserting claims against complainant's title in any Court other than the Florida State Court; hence, there is no occasion to invoke the general rule that the Court first obtaining jurisdiction of a controversy should be permitted to proceed without interference. **Peck vs. Jenness, 7 Howard, 612-624; Central National Bank vs. Stevens, 169 U. S. 432, 459; Bigelow vs. Old Dominion Copper Mining & Smelt-**

ing Co., 74 N. J. Eq. 457, 473, et seq., 71 Atl. 153.

"We deem that the **main object** of the bill to which **all else is incidental** is in contravention of Section 265 of the Judicial Code (formerly Section 720 of the Revised Statutes)."

The doctrine announced by this Court has been followed with practical unanimity by the Circuit Courts and the Circuit Courts of Appeal, the glaring exception being the opinion of Circuit Judge Sanborn in the **Surety case (120 Fed. Rep.,. 598)**, where the doctrine of the leading case of **Peck v. Jenness** was studiously ignored.

In the instant case the Circuit Court of Appeals misapprehended the opinion of this Court in **Ex Parte Simon**.

Independent reasoning or argument is unnecessary to give support or strength to the uniform jurisprudence of this Court. We cannot, however, refrain from quoting the persuasive language of the late Mr. Justice Lurton when sitting as a member of the Court of Appeals.

In the case of the **Southern Bank and Trust Co. vs. Folsom, 75 Fed., 929**, this learned Judge said:

"The injunction restraining the execution of the decree of the State Court was equally unwarranted, and was in violation of the provisions of Section 720 of the Revised Statutes of the United States. That the land ordered to be sold was property of the suitor invoking the injunctive process of the United States Court is no justification. The binding force of that very wise and conservative Statute does not depend upon the real or ultimate rights of the respective claimants of the property involved, or the regularity of the proceedings

sought to be stayed. The Statute prohibits any injunctive restraint upon the proceedings of a State Court and jurisdiction is not conferred by vigorous allegations touching the injustice or invalidity of the objectionable proceedings. (Authorities.)

"In the latter case, this Court had occasion to consider and construe this statute and the cases cited above, and touching them, said:

" 'The principle is that, in order to preserve the dignity and protect the effectiveness of the process of Courts of concurrent jurisdiction, and to avoid unseemly conflicts between them, and between their respective executive officers, no remedy of an injunctive or dispossessory character will be afforded by one Court against the acts of the executive officers of the other Court, when done under color of an order or process issuing from such other Court, because it would have the inconvenient and anomalous effect to stay the proceedings in one Court to allow another Court to investigate the validity of the acts done under such proceedings.' "

In **Phelps v. Mutual Reserve Association, 112 Fed. Rep., 455,** Mr. Justice Lurton in dealing with the question under consideration said:

> "No case has been called to our attention which sanctions the contention of counsel **that the mere fact that the jurisdiction of the State Court is challenged will justify the enjoining of one Court by another.** The State and Federal Courts are independent of each other, except in a limited class of cases, when a writ of error will lie from the highest Court of a State to the Supreme Court

of the United States. They are Courts of equal dignity and of concurrent jurisdiction in respect to the subject matter of this controversy. **Neither Court has the power to control or coerce the other.** If the Circuit Court of the United States has the power and jurisdiction, when diversity of citizenship exists, to enjoin and dispossess a receiver, acting under authority of the Jefferson Circuit Court, **upon a bill averring a defect of jurisdiction,** the other must have an equal right upon a case presenting similar jurisdictional questions. The power must be reciprocal, if it exists. We entirely approve the view expressed by District Judge Love in **Senior v. Pierce (C. C.) 31 Fed., 625, 631** in saying that:

" 'Inasmuch as the very purpose of non-interference is to prevent a conflict between the two jurisdictions, I can see no difference in the application of the principle whether the question to be decided by the two Courts **is one of jurisdiction** or of mere property right, the jurisdiction being conceded. The State Court must needs decide for itself whether or not the seizure proceeding was illegal. There is no other tribunal with competent authority to decide this question for the State Court. If the Federal Court may decide the question of the regularity of the seizure **and jurisdiction** adversely to the State Court, and proceed to take the property from its custody by force, why may not the State Court reciprocally, in any parallel case, decide the same questions when the property is in our custody and proceed by a writ of replevin to dispossess the marshal? But, assuredly, if the Federal Court were in possession by legal process, it **would not permit** the State Court to decide the **question of jurisdiction** and wrest the

property from our control. **The only safe and legitimate course for the suitor is to pursue his remedy by some proper ancillary proceeding in the Court first obtaining jurisdiction, and take his appeal, if not satisfied, to the final justice of the Supreme Court of the State, or of the United States, as the case may require.** It will not do for the suitor to assume that he cannot obtain justice in one jurisdiction or the other. But at all events it is infinitely better that injustice should be done and suffered in particular cases than that a course of proceeding should be sustained fraught with all the evils of conflicting judgments and forcible collisions between the two independent jurisdictions.' "

And in concluding his opinion in this case Mr. Justice Lurton said:

> "Inasmuch as **no relief** whatever can be obtained unless the proceedings in the State Court **can be enjoined,** the cause will be remanded with direction to dismiss the bill for want of equity and to dissolve the injunction."

This Court in affirming the judgment in the case last cited, said:

> "But it has been sanctioned by the judgment of the Court in which the proceeding was had **and cannot be treated by the Federal Courts as unauthorized** (authorities.) **If not warranted by the law of the State, relief must be sought by review in the appellate Court of the State, and not by collateral attack in the Federal Court."**
>
> **190 U. S., 159-160.**

See, also, the following authorities:

Oliver v. Parlin, 105 Fed., 272, (5th Cir.)
M. K & S. R. Co. v. Scott, 13 Fed., 793 (5th Cir.)
Trust Co. v. Bentz, 59 Fed., 645 (5th Cir.)
Union Pac. Co. v. Flynn, 180 Fed., 565, (5th Cir.)
Mass. Assn. v. Lohmuller, 74 Fed., 23.
Couer D'Alene & Co. v. Spalding, 93 Fed. 280.
Ins. Co. v. Schmidt, 175 Fed., 720.

In **Ex Parte Simon,** this Court studiously refrained from passing upon the jurisdictional power of the Circuit Court to issue an injunction staying proceedings in the State Court. The case as presented by the bill charging fraud and ill practice, (and which charges—now that the case has been tried—are shown to have been wholly without warrant or justification) would have been in an appropriate proceeding based on diversity of citizenship, sufficient to have maintained jurisdiction to recover from the beneficiary the fruits of his fraudulent conduct if that had been properly charged and established —but the case as presented did not warrant or justify under the law the issuance of an injunction by the Federal Court to stay proceedings in the State Court.

The learned judges of the lower Conrt failed to appreciate the full force and effect of the **specific** terms of Section 270.

They dealt with the case at bar as though the language of the statute provided that "the writ of injunction shall not be granted by a Court of the United States to stay proceedings of any nature, in any Court of a

State, **except the rendition of judgments therein.**" If the statute had so provided, it would, we submit, have contained some express limitation or restraint upon the language of the **exception**, so as to leave open to inquiry, in the Federal Court, the question as to whether the State Court **had jurisdiction** to render the judgment complained of, or as to whether it was **void** for want of jurisdiction, or was merely **voidable.**

But Congress did not intend to invest the Federal judiciary with the power and authority to investigate and determine the **jurisdiction** of the State Courts in the rendition of judgments, but stayed its hands against interference or **attempted control of proceedings** in the State Court.

The words of the statute "staying proceedings" were used advisedly and cautiously. The broadness of the terms includes **all proceedings** in a State Court, from the filing of the declaration or petition until the final result has been reached.

Riggs v. County, 6 Wall, 166.
Bank v. Stevens, 169 U. S., 464.

Let the distinction be kept clearly in mind between "**staying proceedings**" in a State Court by the process of injunction in a Federal Court, and the **inquiry**, in a proper case, **into the validity of a State Court judgment**, when sued on or set up in a Federal Court, where it is collaterally attacked, as a **void proceeding**, for want of jurisdiction of the State Court to render it, or the case where a bill is filed to **cancel the record** of such a judg-

ment, **as a cloud** upon the title to realty, or the case where it is sought, in an appropriate bill filed in a Federal Court, to compel the defendant **to account for** and to **disgorge** the fruits realized from the **execution** of a fraudulently obtained judgment.

The principle involved in this matter is of transcendent importance. The integrity of our judicial system is at stake. Thus far in our dual governmental system there has been a remarkable freedom from direct conflict between the Federal and State judicial tribunals. That gratifying condition is due, in large measure, to the wisdom of the founders of our government, who, in its earliest days foresaw the dangers which would flow from attempts on the part of the Federal Courts to enjoin proceedings in State Courts and forbade such interference by act of Congress; the principle of this legislation was applied by the Supreme Court at an early period to nullify the attempts of the State Courts to enjoin proceedings in the Federal tribunals.

It comes, therefore, with something of a shock to find that a Federal Court has granted an injunction restraining proceedings in a State Court, where the suit is brought for no other purpose than to secure such injunction where the bill of complaint contains **no other prayer for relief** than that of the restraint of the proceedings in the State Court, and where the record does not even disclose the slightest reason for the granting of such extraordinary relief and negatives the possibility that it is sought to preserve and safeguard the priority or exclusiveness of jurisdiction of the Federal Court.

II.

Because of their close association and dependency we shall consider and discuss under general headings the 6th, 8th, 9th, 11th, 12th, 13th, 14th and 16th assignments of error.

A BILL SEEKING THE RELIEF HERE PRAYED FOR IS BY ITS NATURE AND CHARACTER NECESSARILY AN ANCILLARY BILL.

A bill of **this nature**, seeking such relief as is here prayed for, as between the **same parties in a suit at law**, brought in any Court of America, whether **State or Federal**, must of necessity be or partake of the nature of an **ancillary or dependent bill**, and not, as is the bill in this case, **an original independent injunction bill**. It must where the sole relief is by injunction, be brought **in the same Court** which rendered the judgment complained of, when such Court is competent to grant relief, or at least within the **same jurisdiction**. Such has been the settled doctrine of this Court for almost a century.

Dunn vs. Clark, 8 Peters, 1.
Freeman vs. Howe, 24 How. 450.
Randall vs. Howard, 2 Black, 585.
Minnesota Co. vs. St. Paul Co., 2 Wall. 609-633.
Railroad Co. vs. Chamberlayne, 6 Wall. 748.
Christmas vs. Russell, 14 Wall. 81.
Davis vs. Gray, 16 Wall. 219.

Bank vs. Turnbull, 16 Wall. 195.
Railroad Co. vs. Railroad Co., 111 U. S. 505
Krippendorf vs. Hyde, 110 U. S. 276.
Dewey vs. Coal Co., 123 U. S. 333.
Johnson vs. Christian, 125 U. S. 642-646.
In re. Tyler, 149 U. S. 181.
Root vs. Woolworth, 150 U. S. 401-413.
White vs. Ewing, 159 U. S. 39.
Carey vs. Houston & T. C. R. R. Co. 161 U S. 115.
Julian vs. Trust Co., 193 U. S. 113; Bate Fed. Eq. Proced., Vol. 1, Sec. 97 (Note) quoted and adopted in Julian vs. Trus Co.
Goodrich vs. Hunton, 29 La. An. 372.
Dunlap vs. Stetson (Story, J.) **4 Mason, C C. 349; S. C. Fed. Cas., No. 4164.**

It cannot be possible that the authorities cited are o less weight than the dicta in **Marshall v. Holmes, 141 U S., 589,** to the effect that a bill to enjoin a judgment of State Court, brought in a Federal Court, is properly cog nizable in the Federal Court **as an original and independ ent bill,** where the parties to the bill are the **same partie as the parties in the suit at law in the State Court,** wher the State Court has all of the power and processes to ren der full relief, and that such a bill is **within the jurisdic tion of the Federal Court** if there be the requisite diver sity of citizenship. Such a view is not only **irreconcilable** with the mass of authorities cited, **both in terms and on principle,** but are in conflict with the **positive doctrinal views** of Mr Justice Story, as expressed in his classic work on the **Constitution, Vol III, Sections 1751, 1753,**

and in his **Equity Jurisprudence, Section 900**, where he lays down— as a **fundamental exception** to the general **chancery** doctrine—the principle that neither a State Court will thus interfere with a Federal Court, nor a Federal Court with a State Court, a principle which he says:

> "proceeds upon **peculiar grounds of municipal and constitutional law**, the respective Courts being **entirely competent** to administer full relief in the suits pending therein."
>
> See also, Chancellor Walworth in **Meade v. Meritt, 2 Paige, 404, 405.**
>
> **Bicknell v. Field, 8 Paige, 440, 444.**
>
> Chancellor Pitney in **Bigelow vs. Smelting Company, 74 N. J. Eq., 457, S. C. 71 Atl. Rep., 153.**

COMPLETE AND ADEQUATE REMEDY IN THE STATE COURT.

Aside from the foregoing discussion, it is apparent, as matter of law, upon the face of the bill, that the complainant herein, upon making proper showing, had a plain, adequate and complete remedy in the State Court, both at law and in equity.

> See **Ewing v. City of St. Louis, 5 Wall., 413.**
> **Nougue v. Clapp, 101 U. S., 551.**

First: By filing a motion for new trial, in the State Court, at any time between January 16th and January 20th, 1905, (see deposition of Hall, complainant's attorney, Rec., p 65), setting out all of its grounds, or sim-

ply the ground of want of citation, and thereby suspending and holding in abeyance the final signature of the Judge to the judgment, until it could set up its other grounds for a new trial, if necessary. (Louisiana Code of Practice, Arts. 558-559.) And if there were shown on the face of the motion, sufficient grounds for a new trial, the trial Judge of the State Court, under the letter of the law, must have granted the same. Judge Sommerville's affidavit, Rec., p. 26, and Mr. Hall's unsworn deposition, Rec. p. 67, make plain and evident the fact that this simple, certain and direct method of relief in this case, was deliberately ignored, by counsel for the Southern Railway Company. (Rec. p. 196.) And the circuitous, complex and antinomian procedure that it adopted—in lieu of the direct and simple remedy of new trial in the State Court, of filing a bill in chancery in the Federal Court, and seeking to stay proceedings in the State Court—was merely in keeping with, and a part of its settled and studied plan of defying the statute laws of a Sovereign Commonwealth and holding its Courts, as well as its statutes and laws, in contempt.

Second: By the remedy of suspensive appeal from the final judgment of the Civil District Court, to the Supreme Court of Louisiana, either with or without a prior motion for new trial, upon making, within ten days after the judgment was signed, its motion of appeal in open Court and tendering its appeal bond. And, upon assigning error patent on the face of the record—towit, want of citation, as shown on the face of the sheriff's return, complainant could have thereupon required the Supreme Court of Louisiana to determine whether, on the face of

the record, the judgment of the Civil District Court was a valid judgment, rendered upon proper and lawful citation, under the laws of the State. And, upon setting up, in its assignment of errors, the provisions of the Fourteenth Amendment to the Constitution of the United States, complainant could have laid the foundation for a writ of error, under **Section 709, U. S. Rev. Stat.**, and could have thereby had the judgment of the Supreme Court of the United States upon its case, if denied relief upon a final judgment therein by the Supreme Court of Louisiana.

Third: Under **Article 606 of the Louisiana Code of Practice**, complainant might have had full relief by showing in an action of nullity, coupled with a prayer for injunction, that the judgment was null in point of form, for alleged defective or insufficient citation, or for no citation at all, if that were the fact. And, upon setting up in the petition for nullity, the Fourteenth Amendment to the Federal Constitution, it could have brought the case to the Supreme Court of the United States, upon writ of error to the Supreme Court of Louisiana, pursuant to the terms of **Section 709, U. S. Rev. Stat.**, in the event the State tribunal of last resort denied the force and effect or the application of the constitutional provision invoked in a final judgment, refusing complainant relief.

Fourth: Under **Article 607 of the Louisiana Code of Practice**, complainant might have brought its equitable action of nullity in the State Court, coupling therewith an injunction, by showing that the judgment of the State Court was null for "fraud or other ill practices" or had been obtained upon false or "forged documents." And,

upon setting up a federal question, right or immunity in its petition for nullity, might have had full relief, if entitled thereto, from the Supreme Court of the United States, if cast in the State Court of last resort, upon suing out a writ of error to the final judgment of the Supreme Court of Louisiana, under **Section 709, U. S. Rev. Stat.**

THE COURTS OF THE STATE PROCEED ON THE SAME THEORY AS COURTS OF THE UNITED STATES.

In the event of complainant electing to found its relief in its action of nullity in the State Court, upon the provisions of **Article 607 of the Louisiana Code of Practice**, relief could have been afforded in the same measure and upon substantially the same ground, by the State Courts, that a Court of the United States would have been able to afford upon a bill in chancery, seeking relief from a judgment of the Federal Court, upon a bill **properly framed and verified.** The equitable grounds upon which the Courts of Louisiana will afford relief in an action of nullity, under **Article 607 of the Louisiana Code of Practice** are **at least as broad** as the grounds upon which the Courts of Equity in England and in other States and of the United States will afford relief in cases where they have jurisdiction.

Chinn v. Municipality, 1 Rob., 523.
Paxton v. Cobb, 2 La., 139.
Norris v. Fristoe, 3 An., 146.
Blank v. Speckman, 23 An., 146.

Gayarre v. Millaudon, 23 An., 305.
Perry v. Rue, 31 An., 287.
Bryant v. Austin, 36 An., 808.

It is also settled, by authority, and beyond dispute, that the equitable action of nullity proceeds just as the legal action of nullity for **want of form (C. P. Art. 606) in** the Court of Louisiana, upon th **identical principle** that a Court of the United States, on the equity side, would proceed in entertaining a bill to annul or enjoin a judgment for fraud, accident or mistake, rendered by a Federal Court. In either case, the bill would be **an ancillary bill,** and would be brought in the **same Court** which rendered the judgment complained of, and **not** an original and independent injunction bill as here. See **Goodrich v. Hunton, 29 La. An., 372,** citing and basing its reasoning upon **Freeman v. Howe, 24 How., 460; Dunn v. Clark, 8 Peters, 1; Bank v. Turnbull, 16 Wall., 195.** See also **Barrow v. Hunton, 99 U. S., 80.**

But complainant, stubbornly determined not to submit itself to the jurisdiction of the State Courts of Louisiana, **even as a threshold through which to reach the Supreme Court of the United States,** fearing that there would be sooner or later, a day of settlement with Simon in the Louisiana Courts. So, in order to **destroy** and totally **blot out** Simon's cause of action, and to wipe out **its own admitted legal liability to him or his heirs,** it has sought, and has, so far, successfully applied, the well-known Russian method of **BLACKING OUT** the record of a judgment of a Court of the State by the so-called equitable writ of injunction in this case, issuing from a Court of the United States, a

Court of concurrent jurisdiction with the State Court that rendered the judgment complained of, thus overriding, in its disregard of all law, not only the Courts and the laws of the State, but the Act of Congress of 1793, which was enacted expressly to insure the independence of the State Courts.

In **Nougue vs. Clapp, 101 U. S., 551, 554,** which was an original independent injunction bill, filed in the United States Circuit Court for the District of Louisiana, to impeach a decree and order of sale thereunder, rendered by a State Court of Louisiana, for alleged extrinsic and collateral fraud, and where a prior injunction had been prayed for in the proceedings in the State Court, but had not been issued by the Clerk, through alleged collusion with the defendants to the bill, and where relief was refused by this Court, on the ground that complainant had ample remedy, both by appeal and by action of nullity in the State Court on complainant's own showing, Mr. Justice Miller speaking for the unanimous Court, page 554, said that to entertain this bill as an original bill, and to grant the relief prayed for,

> "would be an **invasion of the powers belonging to that Court** (the State Court) and such a doctrine would, upon the simple allegation of fraud, practiced in the Court, enable a party to retry in a Federal Court **any case decided against him in a State Court.**"

No precedent can be found in the jurisprudence of this Court for entertaining an original and independent injunction bill, where the sole relief sought is an injunction to stay proceedings in a State Court.

ARGUMENT UPON THE MERITS OF THE BILL.

Little remains to be said on the merits of the bill, because the facts which stand out in the record, upon complainant's own evidence, offered in support of the bill, make it plain that the case of complainant is wholly devoid of merit upon the facts. In the first place, the evidential value of the bill is very weak, since the bill is not properly verified in respect to some of its most vital averments, for example:

The averment in paragraph 9 (Rec. p. 5): "Your orator avers that it has never received from the Secretary of State the above referred to citation, issued out of said suit, No. 74,869 of the Civil District Court for the Parish of Orleans, nor was it advised nor had it any knowledge of the pendency of said proceeding, until after the rendition of said judgment," is sought to be sustained by the jurat of A. B. Andrews, First Vice-President of the Southern Railway Company, of date January 31st, 1905, at Washington, D. C., (the bill being filed February 6th, 1905, Rec. p. 1), as follows, to-wit:

> "That he, affiant, has read the foregoing bill of complaint, and that the same is true to his knowledge, in so far as the citizenship and conduct of business of complainant is stated, and that in so far as the **OTHER MATTERS** alleged, he has no personal knowledge as to same, beyond the official records and official statements made to him, but that they are true to the best of his information and belief." (Rec. p. 7.)

This jurat might as well have been made, according to its terms, or for aught that appears in the record, by **any person**, outside the Southern Railway officials, who happened to know that the Southern Railway was a Virginia corporation operating a line of railroad not running continuously and directly into the State of Louisiana, and who was **specially selected** for the reason that he had no knowledge or information of the facts of the case, other than the citizenship of complainant, and the doing of business by the operation of a railway line in to the State of Louisiana, since the jurat neither **states** nor **implies** that the first vice-president is the **PROPER OFFICER** of the corporation **to know** of such **OTHER MATTERS**, as are set up in the bill; nor does it show that the affiant is **authorized** by the charter or by-laws of the corporation, to make such jurat **in the absence** of the president or of such other **proper officer**; nor does the jurat state **who is such proper officer to know** of the **OTHER MATTERS** set up in the bill; nor does it state that such **PROPER OFFICER** has shown **his official records** to affiant, nor that affiant has had **any information whatever** from the **PROPER OFFICER** of the corporation, who is **charged with the duty of knowing** or who should know of such **OTHER MATTERS**; nor that affiant had **ever inquired** as to what the facts were as to notice of service, or as to notice of the issuance of citation or notice of the suit or the pendency thereof from the **PROPER OFFICER** of the Southern Railway Company, or from the **PROPER OFFICIAL RECORDS** of said company. It is entirely possible for aught that appears that **one** or **more** of the general officers of the corporation, **outside of Andrews**,

and that the **PROPER OFFICER**, had notice of the issuance and notice of the service of the citation, and notice of the suit in the case by being advised of the **FACT** of service of citation upon the Secretary of State, without Mr. Andrews being advised of the fact, and that the **proper official records** might show such facts, without Mr. Andrews having seen or had access thereto.

Complainant having alleged, as a bare **equitable ground** of relief no notice of the suit and no notice of citation and no notice of the service of citation upon the Secretary of State, without alleging a single fraudulent act on the part of Simon in reference thereto, **was surely called upon** to produce **at least prima facie sworn evidence thereof** on the face of its bill. This jurat, we submit, is **on its face**, merely perfunctory and **pro forma**, and was **stale** when the bill was filed. We make this, perhaps **hypercritical**, analysis of a mere jurat, merely to **emphasize the character of the "proof"** that was actually offered by complainant in support of the bill at the hearing of the motion for a preliminary injunction, and before the master, whose report **with the evidence and the exhibits thereto, furnished all of the evidence offered on the final hearing.** There is not a line nor a scintila of direct evidence contained in this record, in any jurat, affidavit or deposition offered by complainant, tending to show that the **proper officer** or **agent** of the Southern Railway Company had **no notice of Simon's suit**, or no notice of the issuance or of service of citation, before the entry of default or before the rendition of the verdict and the entry of judgment thereon in the State Court.

W. W. Finley, who was, at the time of the suit, the second vice-president, (Rec. p. 202), and who at the time of his deposition, was the president of the complainant, says not a word about the receipt or non-receipt of notice of the suit or of notice of citation or of service thereof or of the pendency of the suit in his deposition or in his affidavit, although he testifies that **HE WAS THE PROPER OFFICER** at the time of suit to direct the taking of steps in controlling, defending or settling litigation in which the company was involved. (Rec. p. 202.)

There is not a line nor a word in the record denying or negativing knowledge or notice of suit or of the notice of citation or of the notice of service thereof in the deposition of J. C. Andrews, the passenger agent at New Orleans, or of Graham, the freight agent at New Orleans, or of Shumate, the law agent, as he terms himself, nor of Kennedy, the assistant chief law agent, all of whom filed affidavits and depositions in the case. The only other officer, agent or attorney of the company, who makes any reference direct, or indirect in his so-called affidavit or deposition, to notice of suit, or to notice of the issuance or service of citation, in Simon's case, is Mr. Harry H. Hall, the counsel for the complainant in this case, who drew the bill, "**from statements made to him by Colonel Henderson, the assistant general counsel at Washington, D. C.**" (Rec. p. 66.) It is plain from Mr. Hall's unsworn statement, (Rec. pp. 65-67), and from Judge Sommerville's affidavit, (Rec. pp. 25, 26), that he, Mr. Hall, with full knowledge of the verdict and tentative judgment thereon, took no action in the State Court, although there was ample time to do so, be-

tween the entry of the verdict and the signature of the judgment, to move for a new trial, if based on no other ground than the **legal reason, as stated by Mr. Hall,** that the judgment in his opinion, was void for want of citation. (Rec. p. 196.)

There is neither deposition nor affidavit **in any form,** in this record, **from the Secretary of State** or the **Assistant Secretary of State,** that the complainant was not duly **advised** of the service of process, and the only **SCRAP** of so-called evidence offered by complainant, at any stage in the case, from the filing of the bill, to the final hearing, seeking to show that there was no notice of the **fact** of service thereof on the Secretary of State, is an **unsworn** and **unexplained** letter from the Assistant Secretary of State, addressed to "**Harry H. Hall, Esq., P. O. Box No. 444, New Orleans, Louisiana.**" (Rec., pp. 18-19.)

The Assistant Secretary of State appears to state in this letter to Mr. Hall, the following:

> "Acting under the instructions of the Attorney General, we simply filed the copy of citation and petition made on us in the case of **Ephraim Simon v. Southern Railroad Company, No. 74,869, Civil District Court Parish of Orleans, the said company having failed to designate an agent upon whom service of process can be made, as required by law.**"

The letter does not state, nor imply, that the Secretary of State or the Assistant Secretary of State **failed to** notify the president or other **proper officer** of the Southern Railway Company of the **fact** that a citation

and petition **had been served** on the Secretary of State and **was on file in his office.** The foregoing comprises the **whole record** made by complainant in its effort to show that it had received no notice of the suit and no notice of the issuance of citation and no notice of the service of citation upon the Secretary of State in Simon's suit.

Here the **record closes** in relation to direct evidence of notice to the corporation of the service of citation and of the pendency of the suit.

We respectfully submit,

First, that the evidence submitted does not justify the assumption that **no notice** was **in fact** given to the Southern Railway Company, of the issuance or of service of citation upon the Secretary of State.

Second, that the **burden of proof** rested on the Southern Railway Company, to establish, **as a fact** the **unsworn averment,** in its bill of complaint, to the effect that the Southern Railway Company **had no notice** from the Secretary of State, **or from any other source,** of the issuance or the service of citation in Simon's suit, on the Secretary of State, and there should have been additionally to the charge preferred a distinct affirmative allegation, **followed by proof** of some fraudulent act of Simon in defeating and preventing this notice. It was bound to make this showing in order to have any appearance of equity in its bill. Where a cause of action **depends** upon a **negative state of facts,** which is alleged and set up as a **substantive part of the case,** as a ground of relief, it is the undoubted law that **prima facie** the establishment of such

negative state of fact rests upon the party so alleging and relying upon such negative.

If it was the **fact** that the **proper officer** of the Southern Railway **had no notice** of the issuance and **no notice of the fact** of service of the citation in Simon's case, upon the Secretary of State, or of the pendency of the suit, why did W. W. Finley, the second vice-president, who appears to have been such **proper officer at the time of the suit,** (Rec. p. 202) say **not a word,** direct, or indirect, on the subject, either in his affidavit, (Rec. pp. 67,68), or in his **carefully prepared** deposition? (Rec. pp. 198-207). Why was there not a line of testimony or statement on the subject from any other officer, agent, servant or attorney, **except Mr. Hall,** who admittedly had notice on the day the verdict was rendered, and who had **ample opportunity** to move for a new trial or to take other proceedings as he might have thought necessary to protect his friends and clients. (Rec. pp. 65-196.) Why was there no affidavit or deposition from the Secretary of State or the Assistant Secretary of State that the Southern Railway Company were not informed or advised of the service of process? Accordingly, we submit that the **introductory and narrative statement** in the opinion of District Judge Foster, to the effect that "the evidence in this case shows, and it is not disputed, (sic) that the complainant had no **actual notice** of the pendency of the action in the State Court, until **after the final judgment**" is not only not justified or sustained by anything in the record, but is at variance with the statement of Hall, (Rec. p 65) the only witness who spoke on the subject. This statement of the District

Judge was clearly the result of misapprehension of the **exact purport and effect** of the evidence.

We submit that the Southern Railway Company utterly failed to establish the essential, if not the controlling averment of its bill, **"want of knowledge of the pendency of said proceedings."** (Rec. p. 5.) Proof which it was called upon to make, and proof of which fact it was its duty to make.

THE SECRETARY OF STATE THE COMPLAINANT'S AGENT.

The fact that the complainant, doing business in the State of Louisiana did not select a particularly designated agent upon whom process could be served (Act 54 of 1904; Sec. 8 of Act 74 of 1902) leads to the inference that it was presumably contented with the State's designation of the Secretary of State to act as the duly accredited representative of the corporation on whom, when directed against it, legal process could be served.

It was a duty personal to the corporation itself, for its own protection, to advise its **statutory** agent of the disposition to make of process directed against it, and in absence of directions the fault would be chargeable to the complainants' negligence and even were it true (?) in this case that the agent either from want of direction from his principal or from negligence failed in his duty to give notice, his failure or negligence could not

affect the validity of the service of process or the rights of defendant.

This principle was enforced by this Court against a political subdivision of the State in **Knox v. Harshman, 133 U. S., 152,** where Mr. Justice Gray, speaking for the Court, said:

> "Any negligence of the Clerk in communicating the fact to the County Court **was negligence of an agent of the county, and did not affect the validity of the service of the judgment.**"

And in the case of the **State v. County, 51 S. E., 865,** the Supreme Court of West Virginia said:

> "The auditor does nothing but accept service—a mere ministerial act. He does not confess judgment nor does he do any discretionary act. Doubtless, if he fail to warn his corporation of the suit, he would be liable on his bond, just as to any person for failure to perform a legal duty."
> **51 S. E., 865.**

PROOF AS TO DOING BUSINESS.

On the other question of fact set up in the bill as a ground for relief, to-wit, that the complainant was **not doing business** in the Parish of Orleans, in the State of Louisiana, we submit that the proof in this record is simply **overwhelming** against the complainant. On this point of complainant's proof we have the **finding of the**

jury in the State Court (which finding is under the VII Amendment to the Constitution conclusive on every Court of the United States. See in this connection **C. B. & Q. Railroad v. Chicago, 166 U. S., p. 242)** and the judgment of the Civil District Court thereon, as well as the implied finding of Judge Foster, the District Judge, who held that the statute under which the service was made, was **unconstitutional** and who must therefore have found, **as a necessary conclusion of fact,** that the Southern Railway Company **was doing business** within the City of New Orleans, and the State of Louisiana, at the time of Simon's suit, otherwise the Statute could not have been the subject of the Court's consideration, as it was invoked as the **sole ground of jurisdiction** of Simon's suit in the State Court. and the basis for process.

Besides this, we have the distinct, clear and unequivocal finding on this point of fact by the Circuit Court of Appeals of the Fifth Circuit. In its opinion it announced its conclusion on this point in the following words:

> "2nd. At the time the petition was filed in the State Court by the appellant to recover damages of the appellee, to-wit, Dec. 1st, 1904, **the latter was dong business in the Parish of Orleans, State of Louisiana.**" (Rec. p. 310.)

We submit, therefore, that where a **question of fact, tried** by and involved in the **verdict of the jury** is upheld, by the approval and the finding of **three successive Courts,** one State Court and two Federal Courts, that

such **question of fact** must be held **to be conclusively** established.

THE EVIDENCE IN SUPPORT OF THE FRAUD ALLEGATIONS.

All that remains of the bill, **as matters of fact**, are the so-called "fraud allegations." It is only necessary to say that there is not a line, not a word of evidence in the record, tending to support **any one** of the so-called "fraud allegations." The master **found** and expressed in a somewhat involved and diffuse form, the following **definite conclusions.** We shall state, in a more logical order than the master has done, his **conclusions of fact as to the fraud allegations.**

First: The proceedings as shown by the record of Simon's suit in the State Court, assuming that the mode of service was valid "are regular and strictly according to the laws of practice governing the Louisiana Courts." (Rec. p. 173.)

Second: There was no **undue haste,** and **more than the usual delays** were permitted to intervene before the preliminary default was entered and before the judgment by default was confirmed. (Rec. p. 173.)

Third: There was **no false swearing** or false testimony adduced in the trial before the jury or before the Court. (Rec. p. 173.)

Fourth: The judgment of the State Court is "entitled to the presumption that it was **rendered on sufficient evidence.**" (Rec. p. 173.)

Fifth: The evidence does not justify a conclusion that the judgment was rendered by any "**fraud or other ill-practices.**" (Rec. pp. 170-171.)

These findings and conclusions of fact made after a patient hearing of the parties, although excepted to by **complainant** solely on the adverse finding on the fraud charges, (Rec. p. 277) were never set aside by the trial Court nor questioned in any other way. Nor were these findings set aside, denied or disputed by the Circuit Court of Appeals.

In the disposition of the case, the trial Court held that Act 54 of 1914 providing for service of process through the Secretary of State on foreign corporations doing business in Louisiana, was violative of the 14th Amendment to the Constitution of the United States.

No such contention was advanced by the complainant, nor was the **validity** of the act attacked in the bill. **(Southern Railway v. King, 217 U. S., 534; Hanford v. Davis, 163 U. S., 279; Cooley's Constitutional Limitation, 2nd Ed., 252.)** Its application was alone denied by complainant on the sole ground that it was a foreign corporation **NOT** doing business in Louisiana.

The Circuit Court of Appeals in its disposition of the case affirming the judgment below, held: that the mode for service as shown on the face of the sheriff's return was **not valid** under the State law.

The bill on the fraud charges under the proof administered was totally without foundation in fact.

We have, accordingly, the case of a suit in equity to stay proceeding at law without a single equitable ground to sustain it, and decided upon legal points not raised or presented by the pleadings in the cause.

It is submitted that upon the failure of the complainant to establish by sufficient proof the basic matters of fact set up as equitable grounds for relief, it was the plain duty of the Court to deny the relief sought and dismiss the bill.

CONCLUSION.

It is wholly unnecessary to formally discuss here the point raised by the Circuit Court below, as the sole ground of its decision, or the point raised by the Circuit Court of Appeals of the Fifth Circuit, as the sole ground of the decision of that Court, for the reason that each of these grounds, as hereinabove pointed out, is manifestly **ultra petitionem,** and being purely legal moot questions, they are not involved in this cause. No Court in Louisiana has ever decided that Act No. 54 of 1904, of the Legislature of that State with reference to **foreign corporations doing business and having property in the State,** is unconstitutional either under the Federal or State Constitution. No Court in Louisiana has ever held or decided

that a service of citation, made on the **Assistant Secretary of State in the absence of the Secretary of State**, is not a valid service under the State Law involved in this case, or under the Fourteenth Amendment of the Federal Constitution, and no decision of the Supreme Court of the United States has ever so held, in dealing with the Louisiana Statute or any similar State statute, and even if the law under which judgment was obtained was unconstitutional or the service of process invalid, the sole remedy to reverse the judgment of the State Court is through a writ of error from this Court to the highest Court of the State under Sec. 709 of the United States Revised Statutes.

Answering the point on which the Circuit Court of Appeals pitched its opinion and decree we say that under the Louisiana Constitution of 1898, Article 79, and under the letter of the Louisiana Statutes, Revised Statutes 1870, Secs. 3522, 3523, and under the jurisprudence of that State, (see **State v. Clark, 46 An., 1409**) the Assistant Secretary of State is, in the absence of the Secretary of State, **pro hac vice** the Secretary of State. The State Statute of Louisiana (Act 54 of 1904) pursuant to which jurisdiction was acquired by the State Court, in Simon's case, is modeled on, and was patterned after, the Pennyslvania Statute, which was upheld by this Court in **Ex Parte Schollenberger, 96 U. S., 369**, and is supported by the line of decisions of this high tribunal, that have repeatedly affirmed and re-affirmed that case, and the Statute in question is nearly identical in terms with many other State Statutes on the same subject matter that have been expressly upheld as due process of law

under both State and Federal Constitutions, by State as well as by Federal Courts.

See, also:

Railroad Company v. Harris, 12 Wall, 65.
Railroad Company v. Whitton, 13 Wall, 270.
Pennoyer v. Neff, 95 U. S., 714.
New York, etc, Railway Company v. Estill, 147 U. S., 608.
Barrow Steamship Company v. Kane, 170 U. S., 109.
Connecticut Mutual Life Insurance Company v. Spratley, 172 U. S., 602.
Mutual Reserve Association v. Phelps, 190 U. S., 147.
Pringle v. Woolworth, 90 N. Y., 509.
Foster v. Traders Mutual Life Insurance Company, 48 S. E. Rep., (N. C) 667.
State v. St. Mary's Petroleum Company, 51 S. E. Rep., (W. Va.) 865, affirmed in 203 U. S., 183.
Wilson v. Seligman, 144 U. S., 45.
Ehrmann v. Teutonia Insurance Company, 1 Fed. Rep., 475.
Knapp Company v. Insurance Company, 30 Fed., 607.
Diamond Glass Company v. Minneapolis Company, 55 Fed., 27.
Berry v. Company, 46 Fed., 439.
Merchants v. Railway, 13 Fed., 358.
Palmer v. Chicago, 70 Fed., 886.

Stewart v. Harman, 98 Fed., 190.
Miller v. Council, 63 N. W Rep., 565.
Youmans v. Co., 67 Fed., 282.
Wilson v. Co., 20 N. E., 318.
Sparks v. Ass'n., 69 N. W., 678.
Hinkley v. River Co., 72 N. W., 835.
Keystone vs. Court, 72 Pac., 398.
Farrell v. Gold Mine, 49 Pac., 876.
Commonwealth v. Parlin, 80 S. W., 791.

And finally it is confidently submitted that neither could the United States Circuit Court have decided the moot question of Federal law on which it professed to base its decision in this case, nor could the United States Circuit Court of Appeals have decided the equally moot question of State law upon which it based its decision in this proceeding without inferentially assuming the power to sit as a Court of Errors or Appeals over the State Court, which had assumed jurisdiction and decided in this case these identical questions the other way.

The moot questions decided by these two Federal Courts therefore raise a wholly uncalled for conflict of authority between Courts of concurrent jurisdiction, to-wit: a conflict of authority between the Civil District Court, **in asserting jurisdiction** to try the case of **Simon v. The Southern Railway Company**, and the United States Circuit Court for the Eastern District of Louisiana, asserting that the Civil District Court for the Parish of Orleans, **was without jurisdiction** to try the case of **Simon v. The Southern Railway Company**, all of which is inimical to the whole theory of the independence as well as to the

harmony of the two separate systems of State and Federal judicature, a condition of affairs which is expressly condemned by the high authorities hereinabove cited and quoted.

In the case at bar the sole relief sought and prayed for is the "granting" of a "writ of injunction by a **Court of the United States** to stay proceedings in a **Court of a State**," without any **pretense** that this case is **within the exception** of the Statute as to bankruptcy, without any **pretense** of any **prior or exclusive jurisdiction** or **jurisdiction by removal** of the cause, or under any Federal Statute; without any **showing** of right to such relief, as a matter of equity and without any **pretense** that the State Court could not in an ancillary proceeding grant all the relief both at law or in equity, that any Federal Court could possibly grant in an original and independent proceeding, where its jurisdiction was undoubted, and its powers not fettered by a prohibitory statute as it is in this case. To the sole relief sought, we have invoked as a conclusive bar to the jurisdiction of the Federal Court, the inhibitory terms of Section 5 of the Judiciary Act of 1793, (now Section 720 United States Revised Statutes., and Section 265, of the Judicial Code) with the long line of decisions thereon, pronounced by this high tribunal, from **Diggs v. Walcott, 4 Cranch, 179**, to **Hull v. Burr**, just decided—a statute which this high tribunal has said, in its very last decision on the subject "has been constantly observed by the Courts."

It is therefore, most respectfully and deferentially urged and submitted, that the decree of the Circuit Court of Appeals for the Fifth Circuit, affirming the decree of

the United States Circuit Court for the Eastern District of Louisiana, is manifestly erroneous and should therefore be reversed, and the cause remanded to the United States District Court for the Eastern District of Louisiana, with directions to dismiss the bill of complaint herein, with costs.

Respectfully submitted,

HENRY L. LAZARUS,
Solicitor for Defendant and Appellant.

HERMAN MICHEL,

ELDON S. LAZARUS,

DAVID SESSLER,

GIRAULT FARRAR,

Of Counsel.

September 20, 1914.

APPENDIX.

EXTRACTS FROM THE CONSTITUTION OF LOUISIANA OF 1898.

Article 264:

No domestic or foreign corporation shall **do any business** in this State, without having one or more known places of business, and an authorized agent or agents in the State upon whom process may be served.

Article 79:

The Treasurer, Auditor, Attorney General and Secretary of State shall be elected by the qualified electors of the State at the time and place of voting for representatives, for the term of four years; and in case of vacancy caused by death, resignation, permanent absence, or otherwise, of any of said officers, the Governor shall fill the vacancy by appointment, with the advice and consent of the Senate; Provided, the Secretary of State shall have authority to appoint an assistant, who shall be known as Assistant Secretary of State, and in the absence of the Secretary of State or in case of his disability to act, or under the directions of the Secretary of State, the Assistant Secretary of State shall have authority to perform all the acts and duties of the office of Secretary of State.

The Secretary of State shall have authority to remove the Assistant Secretary of State at pleasure.

Article 160:

Members of the General Assembly and all officers, before entering upon the duties of their respective offices, shall take the following oath or affirmation:

> **"I (A. B.), do solemnly swear (or affirm) that I will support the Constitution and laws of the United States and the Constitution and laws of this State; and that I will faithfully and impartially discharge and perform all the duties incumbent on me ..... according to the best of my ability and understanding. So help me God."**

EXTRACTS FROM THE SESSION LAWS OF LOUISIANA.

ACT NO. 54 OF 1904,

To carry into effect Article 264 of the Constitution of 1898, in respect to foreign corporations doing business in this State.

Section 1. **Be it enacted by the General Assembly of the State of Louisiana,** That it shall be the duty of every foreign corporation doing any business in this State to file in the office of the Secretary of State a written declaration setting forth and containing the place or locality

of its domicile, the place or places in the State where it is doing business, and the name of its agent or agents or other officer in this State upon whom process may be served.

Section 2. **Be it further enacted,** etc., That whenever any such corporation shall do **any business of any nature whatever in this State** without having complied with the requirements of Section 1 (one) of this act, it may be sued for any legal cause of action in any parish of the State where it may do business, and service of process in such suit may be made upon the Secretary of State the same and with the same validity, as if such corporation had been personally served.

Section 3. Be it further enacted, That all laws and parts of laws in conflict or inconsistent with this act, be and the same are hereby repealed.

ACT NO. 74 OF 1902,

Relative to the powers of railway corporations organized and existing under the laws of this State, or any other State or Territory or of the United States.

Section 8. **Be it further enacted, etc., that railroad** companies or corporations availing themselves of the provisions of this act, shall have and maintain a domicile and main and general office in this State and be subject to the control and regulations of the laws of this State and the Railroad Commission, as well as the jurisdiction of the State Courts.

EXTRACTS FROM THE REVISED STATUTES OF LOUISIANA.

Section 3522, R. S.:

The Secretary of State is hereby authorized to appoint an Assistant Secretary of State.

Section 3523, R. S.:

The Assistant Secretary of State, so appointed, shall, after having taken and subscribed the oath required by the Constitution of the State, be fully authorized to perform all or any of the duties or official acts required by law of the Secretary of State, during the sickness or absence for any cause of the latter; and the Secretary of State alone shall be responsible for all acts so performed; said assistant shall also assist and aid in the performance of such duties pertaining to the office as may be required of him by the Secretary of State; and he shall receive as payment in full, for services thus rendered, the sum of two thousand dollars per annum, payable quarterly on his own warrant, approved by the Secretary of State.

EXTRACTS FROM THE CASE OF STATE OF LOUISIANA V. PHIL CLARK, ET AL., REPORTED IN VOLUME 46, LOUISIANA ANNUAL REPORTS, PAGES 1409-1412.

Syllabus: The certificate of the Assistant Secretary of State is competent evidence of the promulgation of a law.

The opinion of the Court was delivered by Watkins, J.

"Phil Clarke, Richard Wilson, Martin Jones, Julien Mullet and Edward Isaacs were indicted for a conspiracy to commit murder, and the last two, having been convicted and sentenced to the penitentiary, have appealed.

* * * * * * *

"Objections were made, however, by the State's Attorney to the admission in evidence of the certificate of the Assistant Secretary of State, and the objections having been sustained by the Court, the defendant's counsel retained the aforesaid bill and annexed the certificate thereto.

* * * * * * *

"The Civil Code provides that the Secretary of State 'shall keep a register in which he shall write down the title of all laws passed by the Legislature, together with the dates when they shall have been respectively published in the State paper; and the register thus kept or the **certificate delivered from the same,** by the Secretary of State, under his official signature and seal, shall be evidence of the publication of the laws,' etc.

Revised Civil Code, Art. 6; Revised Statutes, 3493.

"The Secretary of State is authorized to appoint an Assistant Secretary of State.

Revised Statutes, Sec., 3522.

"And the Assistant Secretary of State 'is fully authorized to perform all or any of the duties or official acts required by law of the Secretary of State.' etc.

Revised Statutes, Sec., 3523.

"It is evident that the certificate of the Assistant Secretary of State was competent evidence for the purpose for which it was offered, and that rejecting it was error on the part of the trial Judge, which entitles the defendant to relief.

"Reversed and remanded."

EXTRACTS FROM THE CODE OF PRACTICE OF LOUISIANA.

Article 310, C. P.:

If the defendant do not appear either in person or by his advocate after the delay provided by law, the plaintiff may take a judgment by default against him.

Article 311, C. P.:

Such judgment may be obtained by moving for it in Court, but it consists merely in a statement on the records of the Court, showing that the defendant has failed to appear.

Article 312, C. P.:

If, two days after this first judgment has been rendered, the defendant neither appear nor file his answer, definite judgment will then be given for the plaintiff, provided he prove his demand. This proof is required in all cases.

Article 314, C. P.:

If the defendant, on the very day when a definitive judgment by default was to have been rendered against

him, appear and file his answer, the first judgment taken shall be set aside.

Article 360, C. P.:

When the defendant suffers judgment by default to be taken against him, the issue is joined tacitly, because such defendant is presumed by his silence to have confessed the justice of his adversary's demand; therefore the plaintiff is allowed to proceed with his proofs in order to have the judgment confirmed.

Article 546, C. P.:

The Judge must sign all definitive or final judgments rendered by him, but he shall not do so until three judicial days have elapsed, to be computed from the day when such judgments were given; provided, that hereafter, (except in the Parish of Orleans), all motions for new trials in causes, shall be made and determined, and all final judgments signed before the adjournment of the Court, for the term at which such causes were tried, and whether three judicial days shall have elapsed or not.

Article 604, C. P.:

One may demand the nullity of a judgment for any of the causes provided in this section, even if no appeal have been taken from the same, or if the delay for taking the same have expired.

Article 605, C. P.:

The causes for which the nullity of a definitive judgment may be demanded are two-fold: those that are relative to the form of proceeding, and those that appertain to the merits of the question tried.

Article 606, C. P.:

The vices of form for which a judgment can be annulled are the following:

1. If a judgment has been rendered, even contradictorily, against a person disqualified by law from appearing in a suit, as a minor without the assistance of his curator or tutor, or a married woman without the authorization of her husband or of the Court;

2. If the defendant, although qualified to appear in a cause, have been condemned by default, without having been cited.

3. When the judgment, though clothed with all the necessary formalities, has, nevertheless, been given by a Judge incompetent to try the suit, either owing to the amount in dispute, or to the nature of the cause;

4. If the defendant has not been legally cited, and has not entered appearance, joined issue, or had not a regular judgment by default taken against him.

Article 607, C. P.:

A definitive judgment may be annulled in all cases where it appears that it has been obtained through fraud or other ill practices on the part of the party in whose favor it was rendered; as if he had obtained the same by bribing the judge or the witnesses, or by producing forged documents, or by denying having received the payment of a sum, the receipt of which the defendant had lost or could not find at the time, but was found since the rendering of the judgment.

Article 608, C. P.:

The nullity of judgment may be demanded from the ame Court which has rendered the same, or from the ourt of appeal before which the appeal from such judgnt was taken, pursuant to the provisions hereafter exressed.

Article 611, C. P.:

Though there has been no appeal within the delay prescribed by law, the nullity of the judgment may yet be demanded by means of an action brought before the Court which has rendered the same, within the delay hereafter provided.

Article 612, C. P.:

The nullity of a judgment rendered against a party without his having been cited, or by an incompetent Judge, even if all the formalities of the law have been observed, may be demanded at any time, unless the defendant were represented in the parish, and yet suffered the judgment to be executed without opposing the same.

The same rule should govern, as regards a defendant not qualified to appear in a suit where judgment has been given against him, if he suffer the judgment to be executed against his property without opposing the same.

OCT 30 1914
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 34.

EPHRAIM SIMON, APPELLANT,

vs.

SOUTHERN RAILWAY COMPANY, APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

REPLY BRIEF OF APPELLANT.

HENRY L. LAZARUS,
Attorney for Appellant.

HERMAN MICHEL,
ELDON S. LAZARUS,
DAVID SESSLER,
GIRAULT FARRAR,
Of Counsel.



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Hull *vs.* Burr (decided June 22, 1914).

alleges that "such an act (referring to act 54 of 1904 of the statutes of Louisiana) would be an attempted regulation of interstate commerce and in violation of the Constitution of the United States."

> "And your orator further avers that any judgment rendered upon such attempted citation, would be, if rendered without appearance of the defendant, a judgment without due process of law, and consequently, in violation of said Constitution."
> (Rec., p. 4.)

That appellee has based its contention on the unconstitutionality of act 54 of 1904. (See its brief, p. 96.) The district judge held that act 54 of 1904 was unconstitutional. (See his opinion, Rec., p. 294.)

Furthermore, the SOLE RELIEF PRAYED FOR in the bill of complaint is for a writ of injunction. It reads:

> "* * * your orator therefore prays that the said Ephraim Simon who is plaintiff, as aforesaid, in said action at law, entitled Ephraim Simon *vs.* The Southern Railway Company, No. 74869 Civil District Court for the Parish of Orleans, his counselors, attorneys, solicitors or agents may be restrained by an injunction issuing out of this court **from further proceedings against your orator, under the said suit and judgment, or from issuing execution thereon, or attempting thereunder to seize any property, movable or immovable of your orator, or in any manner attempting to enforce the same.**"
> (Rec., p. 6.)

This prayer for an injunction seeking to restrain the defendant from the execution of the judgment obtained by him in the State court necessarily involved the violation of the statutory prohibition as embodied in section 720, R. S. U. S.

The demurrer (Rec., p. 24), the first pleading filed by appellant, after the issuance by the trial court of the preliminary injunction, squarely raised the issue upon the face

of the bill whether the district court (then circuit court) had power to grant the relief prayed for. The two constitutional questions (the commerce clause and due process) expressly appearing on the face of the bill, and the fundamental Federal issue necessarily involved in the sole relief prayed for, namely, the power and authority of the Federal court to issue its writ of injunction staying proceedings in the State court, demonstrate that the bill was not based "solely" or "entirely" on diversity of citizenship. This court, interpreting the statutes of Congress as to the limits of its jurisdiction, has repeatedly passed upon this question.

In petition addressed to the Circuit Court of Appeals for the allowance of an appeal to this court it is averred that the amount in controversy exceeds the sum of $5,000, and that the bill of complaint of the Southern Railway Co., upon which relief is sought, is based upon two grounds:

> "1st. Diversity of citizenship.
>
> "2d. The claim of complainant that against the enforcement of the judgment complained of and sought to be enjoined, it is averred that complainant's rights were protected under and by virtue of paragraph (3), section (8), article (1) of the Constitution of the U. S., and by section (1) of the Fourteenth Amendment to the Constitution of the U. S.
>
> "That the jurisdiction of the circuit court to grant the relief sought by complainant and the exercise of which jurisdiction was approved and affirmed by this court, **was dependent upon the recognition of complainant's right to the protection of the Federal Constitution, as set out in its bill, without which the circuit court and this court would be without power or jurisdiction to grant the relief prayed for.**
>
> "That the circuit court and the Circuit Court of Appeals upon complainant's bill assumed jurisdiction of said cause, and the Circuit Court of Appeals affirming the judgment of the circuit court, rendered judgment enjoining the execution of the judgment of the State court of Louisiana, in violation of section 720 of the Revised Statutes of the U. S., and that this is a proper case to be reviewed on appeal by the Supreme Court of the U. S."
>
> (Rec., pp. 327-8.)

The third error assigned on this appeal, and directed against the judgment of the Circuit Court of Appeals, is in the following words:

> "That the Circuit Court of Appeals erred in affirming the jurisdiction of the Circuit Court of the United States, based on the averments of complainant's bill, that the judgment of the State court was in its effect and operation violative of article 1, section 8, paragraph 3, of the Constitution of the United States, and of section 1 of the Fourteenth Amendment to the Constitution of the United States; and the court erred further when, by its decree in this cause, it recognized the power and authority of the Circuit Court of the United States to annul a judgment of the Civil District Court of the Parish of Orleans, State of Louisiana, a court of concurrent jurisdiction with the said Circuit Court of the United States."
>
> (Rec., p. 330.)

With complainant's bill and its recitals as you open the record—the petition for an appeal and the assignments of error—how is it possible to advance the suggestion that the bill "raises no constitutional questions," and therefore "the jurisdiction of the circuit court must have been invoked on grounds of diverse citizenship solely," in which event "the judgment of the Circuit Court of Appeals is final, and the present appeal must be dismissed?"

(Appellee's brief, p. 7.)

"Mirabile dictu."

With the constitutional protection invoked by complainant in its bill, and its recognition judicially accorded in defiance of a statutory prohibition, we submit that under the text of the law and the jurisprudence of this court this cause is properly here on appeal for review.

In Ohio R. R. Co. *vs.* Worthington, Mr. Justice Day said:

> "It thus appears that jurisdiction was invoked, not only because the present case is ancillary to the

receivership suit, which depended on diverse citizenship, but upon grounds which involve alleged infractions of the Federal Constitution and rights secured thereby. The case was therefore one which might have been taken to the Circuit Court of Appeals, and the fact that it involved grounds which might have warranted a direct appeal to this court did not deprive the Circuit Court of Appeals of jurisdiction (authorities).

"The question then is: Is this one of the cases made final in the Circuit Court of Appeals by the act creating that court? The sixth section of that act provides that the judgment of the Circuit Court of Appeals 'shall be final in all cases in which the jurisdiction is **dependent entirely** upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different State; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws, and in admiralty cases.' In all other cases there is a right of review by this court if the matter in controversy exceeds one thousand dollars. * * * The case is therefore one not made final in the Circuit Court of Appeals, and the appeal to this court was properly allowed (authorities)."

225 U. S., pp. 104-105.

The jurisdiction of this court to entertain this appeal is undoubted, tested by the rules announced by Mr. Justice Van Devanter in Shulthis *vs.* McDougal (225 U. S., 569). We submit that "from the complainant's statement of its own cause of action as set forth in the bill," it sets out a cause (independently of diversity of citizenship) arising under the Constitution or laws of the United States, upon the construction of which success or defeat depends.

N. P. R. R. *vs.* Soderberg, 188 U. S., 521-527.

L. & N. R. R. *vs.* Cook Brewing Co., 223 U. S., 80.

Am. Sugar Ref. Co. *vs.* N. O., 181 U. S., 281-282.

In **Henningsen** *vs.* **U. S. Fidelity & Guaranty Co.**, 208 U. S., at page 409, Mr. Justice Brewer said:

> "A motion is made to dismiss on the ground that the jurisdiction of the circuit court was invoked solely on the ground of the diversity of citizenship of the parties, and hence the decree of the Circuit Court of Appeals was final. The motion must be overruled. Diversity of citizenship was, it is true, alleged in the bills, but grounds of suit and relief were also based on the statutes of the United States, as from the discussion of the merits will be seen. Those **statutes** entered as elements into the decision of the Circuit Court of Appeals, and were necessary elements. **Howard** *vs.* **United States**, 184 U. S., 676; **Warner** *vs.* **Searle & Hereth**, 191 U. S., 195, 205."

Mr. Justice Pitney, in **Hull** *vs.* **Burr** (decided June 22, 1914), gives expression to the "last word" of the court on this question—the case is not only important because of the principle announced, but because it is a case on "all fours" with the instant case, involving the identical question here for consideration and coming here as the instant case from the Circuit Court of Appeals. The learned justice, in delivering the opinion of the court, said:

> "The Circuit Court of Appeals * * * placed its decision upon the ground that the complainants were invoking **not the powers** of the district court in bankruptcy, **but its general powers as a court of equity**; that it also appeared that **the proceedings in Florida** were instituted by a bill in equity, with the parties reversed; that the Florida court was a chancery court and a court of superior jurisdiction in equity and for present purposes of equal dignity and authority with District Court of the U. S. for the District of Mass.; **that the bill in substance merely invoked the general equitable jurisdiction of the district court in order to restrain proceedings in a State court proceeding in equity in a prior suit between the same parties**; and this ran counter to §720 R. S. (§265,

Judicial Code), as well as to the general principle that the authority of the court first acquiring jurisdiction, the parties being the same, must prevail (authorities).

"There is a motion to dismiss the appeal upon the ground that the jurisdiction of the district court depended solely upon diversity of citizenship, and that therefore the decree of the Circuit Court of Appeals is final under §128, Judicial Code * * *. The motion must be granted **unless the suit was one arising under the** LAWS **of the U. S. within the meaning of the first subdivision of §24 of the Code.** The rule is firmly established that a suit does not so arise **unless it really and substantially involves a dispute or controversy respecting the** validity, construction or **effect of some law of the U. S. upon the determination of which the result depends.** And this must appear not by mere inference, but by distinct averments according to the rules of good pleading; not that matters of law must be pleaded as such, but that the essential facts must show, not as a matter of mere inference or argument, but clearly and distinctly, **that the said suit arises under some Federal law** (authorities).

"We have not considered whether the action could be regarded as ancillary to the proceedings in bankruptcy, and for that reason maintainable in the district court as a suit arising under the laws of the U. S. (authorities), **because complainants have not planted themselves upon that ground.** Complainants are not parties to the proceedings in bankruptcy and are setting up rights in opposition to the adjudication and the appointment of trustees therein. **They seek to have the trustees restrained from** prosecuting the equity suit against them in the State court of Florida and to that end undertake to show (*a*) that the bankruptcy proceedings were void for want of jurisdiction; (*b*) that the entire proceedings were a fraud upon the bankrupt act; and (*c*) that, even if the proceedings were valid, the appointment of the trustees was void. **This is the theory of the bill of complaint, and it is by this that the right of ultimate appeal to this court is to be tested,** rather than by the grounds upon

> which the district court and the Circuit Court of Appeals reached conclusions adverse to the relief prayed * * *. We deem, therefore, **that the suit is one arising under the laws of the U. S.**, within the meaning of §24 Judicial Code, and the motion to dismiss will be denied."

On the merits the case was disposed of on the ground that the proceedings were in contravention of section 720 of the Revised Statutes of the U. S.

Aside from every other consideration, the complainant's bill on its face shows that by its cause of action it sought to be relieved from the operative effect of the judgment of the State court, and **the only relief prayed** was to **enjoin** the proceedings in the State court, and this in open disregard of a prohibitory statute of the United States which in terms provides that "the writ of injunction shall not be granted **by any court of the United States** to stay proceedings in any court of a State. * * *"

Therefore, upon the basis of complainant's own statement of the case, there was involved the consideration of the **laws of the United States,** upon the construction of which depended success or defeat.

We therefore submit that the questions involved in this controversy are properly here on appeal for this court's review.

The brief of counsel for appellee is singularly lacking in fairness of statement. It begins with a misstatement minimizing Simon's injuries, which were **before the jury** in the State court, and in satisfaction of which the jury **found** and allowed him compensatory damages. It is not the whole truth to say Simon "had his ankle slightly strained" (Brief, p. 8), nor is it the whole truth to say that "after the accident the railway surgeon examined Simon's injuries and pronounced them **inconsiderable.**" The record facts are that **both** of Simon's **ankles** and **lower limbs** were **seriously injured,** and that his injuries, resulting from the collision on

the line of the Southern Railway, were so far **permanent** that he was a visible cripple and walked with difficulty.

In his petition in the State court Simon alleged that "your petitioner's **ankles** were **severely sprained** and the **ligaments** of his **legs lacerated** and **torn.**"

> "Petitioner represents that although **ten months** have elapsed since the accident and injuries complained of occurred, **petitioner is still suffering from the effects thereof,** and is unable to pursue the course to which he was accustomed, of long walks, and, in changeable weather, **he sustains great pain in his lower limbs and ankles,** and has not the **full** and **free use of his limbs,** as he had prior to the injuries of which complaint is here made."
>
> (Rec., p. 12.)

Simon was present, as is shown on the face of the record, **in propria persona** before the jury, and the jury had **ocular evidence** of the nature and extent of Simon's injuries (Rec., pp. 16-17). The record also shows that the jury heard the testimony of Simon's physician (Dr. Gaudet), who treated him for two months, after making a thorough **diagnosis** (Rec., pp. 48-49). See minutes of State court (Rec., pp. 16-17), attached as an exhibit to the bill of complaint.

Nor is it any nearer to the facts of the record for counsel to state, as he does state in the brief (p. 8), that "Simon **originally** claimed $5,000.00." This statement is shown to be incorrect notably by the affidavit of Henry L. Lazarus (Rec., pp. 31-35), of Ephraim Simon (Rec., pp. 26-31). See particularly deposition of Dr. Martin, complainant's witness (Rec., pp. 186-7).

Appellee (Brief, p. 8) intimates that in the district courts of New Orleans it is the universal custom to have the testimony transcribed stenographically, and counsel for appellee—unfairly, as we think—seeks to point out this fact as being a suspicious circumstance. This charge is not only gratuitous, but is **ultra petitionem.** Furthermore, there is no such "universal custom" in the courts of Louisiana.

Under the laws of Louisiana (Code of Practice, art. 601) it is optional with either party to the controversy "to take down the testimony in writing." The Supreme Court of Louisiana has passed upon this question repeatedly. In the case of the **Succession of John T. Moore,** 42 An., 335, the court, quoting approvingly from **Simon** *vs.* **Howard** (23 La. An., 504), said:

> "We find no note of evidence in the record. In such a case we will presume the court **a qua,** in rendering judgment, proceeded on proper evidence. **Citizens' Bank** *vs.* **Bringier,** 22 An., 20; **State** *vs.* **Monsterio,** 26 An., 634; **Smith** *vs.* **City of New Orleans,** 24 An., 20; **Succession of Pilcher,** 34 An., 362."

and then adds:

> "**The parties were not required to have their evidence reduced to writing or to see that a note is made of the evidence introduced.**"

In this case however the minute entry of the court discloses the names of the witnesses called on the trial on behalf of the plaintiff (Rec., pp. 16-17).

Again, in **Rosenthal** *vs.* **Rosenthal,** 42 So. Rep., 270, the Supreme Court of Louisiana said: "The testimony adduced during the trial is not reduced to writing **unless** at the request of one of the parties (C. P., 601)."

Advised, as the Southern Railway Company's counsel was, from an inspection of the record before the signing of the judgment, (Rec., pp. 25-6) a statement of facts could have been required and the trial judge would have prepared a statement of the evidence as adduced on the trial, so as to enable the appellate court to review the judgment based upon his findings. But no such request was made.

Art. 602 of the Code of Practice of Louisiana provides:

> "When the depositions of witnesses **have not been taken in writing in the inferior court,** the party in-

tending to appeal, or his advocate, must require the adverse party or his advocate, to draw, jointly, with him, a statement of the facts proved in the cause, and this statement thus drawn and signed, either by the parties or their advocates, shall be annexed to the records, and a transcript of the same transmitted to the Supreme Court."

Art. 603, Code of Practice, provides:

> "If the adverse party when required to do so, refuse to join in making out the statement of facts, or if the parties cannot agree as to the manner of drawing the same, **the court, at the request of either, shall make such statement according to their recollection of the facts,** or from the notes they have taken of the evidence."

The judge of the Civil District Court, having seen and heard the witnesses, charging the jury on the law, the consideration to be accorded the verdict, with his independent appreciation of the evidence and the law, expressly adjudged "that the **demand of plaintiff was proved**" (Rec., p. 17).

Appellee in its brief (p. 101) charges that, Simon's injury having befallen him in Alabama, the Louisiana courts were without jurisdiction to entertain his suit. This charge is also **ultra petitionem**. There is not a line in complainant's bill charging that the judgment is void **ratione materiæ**, on the ground that the Louisiana court had no jurisdiction because the accident took place in Alabama. The answer is found in section 2 of act 54 of 1904, which reads:

> "That whenever such corporation shall do **any business of any nature in this State** without having complied with the requirements of this act, it may be sued for **any legal cause of action** in any parish of the State where it may do business * * *."

The finding of the Court of Appeals was that the corporation did do business in Louisiana; hence under the statutes

"it may be sued for any legal cause of action in any parish of the State where it may do business" and its liability is not limited by the terms of the statute to the **locus in quo** of the accident.

In **Barrow Steamship Co.** *vs.* **Kane,** 170 U. S., 100, this court held that "the Circuit Court of the United States held **within the State** had jurisdiction of an action brought by a citizen and resident of **another State,** against a **foreign corporation** doing business in the first State for a cause of action **arising in a foreign country.**" See Railroad *vs.* Harris, 12 Wall., 65.

Was the Southern Railway Company Doing "Any Business of Any Nature Whatever" in the State of Louisiana?

On page 67 of appellee's brief the court's attention is directed to the inquiry:

> "Was the Southern Railway Company doing business in Louisiana in such a sense as to be subject to process in that State?"

In the submission of our brief to this court (p. 69) we regarded this question as foreclosed and concluded, by the express finding of the Circuit Court of Appeals, that "At the time the petition was filed in the State Court by the appellant to recover damages of the appellee, to wit, December 1, 1904, **the latter was doing business in the Parish of Orleans, State of Louisiana**" (Record, p. 310), and that this finding was a final determination on the question of **fact,** the question of **law** upon which the Circuit Court of Appeals pitched its opinion being alone open to review (234 U. S., 380; 232 U. S., 338).

Since, however, the appellee seeks to have this court review the record and the court's finding on this question of fact (Appellee's Brief, pp. 67 to 96), we feel that in justice to the circuit court, to the Circuit Court of Appeals, to the State court, and to ourselves we should fully and **fairly**

advise this court of the **true** facts as disclosed by the record, and upon which the Circuit Court of Appeals based its finding.

We reproduce here the argument submitted to the circuit court and to the Circuit Court of Appeals:

The case as presented, and our observations and comments will be restricted to the evidence, oral and documentary, without regard to the master's report, who under the order complained of (Rec., p. 278-9) undertook to report not only his conclusions, based upon the facts, but his findings of law. We shall ignore the master's report and findings and deal alone with the evidence, respectfully requesting from the hands of this court its independent findings of facts and its appreciation of the law applicable **thereto.**

It is conceded and, if it be not, it is not debatable that under the uniform decisions of the Supreme Court of the United States a State has the power to determine the conditions upon which a foreign corporation can enter into its territory and transact business, and to determine under what conditions, when transacting business, it shall be subjected to the jurisdiction of its courts.

If, therefore, the record establishes the fact that at the time of the institution of Simon's suit against the Southern Railway it was transacting business in the State of Louisiana, and that process was served upon the Secretary of State, who was at the time the **legally** designated **agent** of the complainant, then the jurisdiction of the State court **ratione personæ et ratione materiæ** was perfect and its judgment free from attack or review in this proceeding.

The basis of complainant's bill is:

First. That the Southern Railway Company **was not doing** business in the State of Louisiana, and therefore the Secretary of State, designated by law, was not authorized to receive process subjecting it to the jurisdiction of the courts of the State.

Secondly. That the judgment of the State court, of which complaint is made, was based upon false testimony, and that the judgment rendered was unconscionable.

As to the second contention of the complainant, that the judgment rendered was based upon false evidence and unconscionable, there is not one "jot or tittle" of evidence in this record to support this reckless and wanton charge. All of the **ex parte** affidavits were, by stipulation of record, to be treated as depositions **de bene esse** (Rec., pp. 240, 243), and the verdict rendered by the jury and the judgment rendered by the court, finding by its decree, that the plaintiff's case had been "**proved**" (Rec., p. 17), are a complete and perfect refutation of the insinuations and reckless charges leveled at its correctness. With that question, however, it is respectfully submitted that this court has nothing to do. If it finds either that this court is without jurisdictional power by its injunctive process to stay the proceedings of the State court or that the State court had jurisdiction **ratione personæ et ratione materiæ** to hear and determine the cause, that should end this controversy.

Courts, like individuals, are "inclined to follow the paths of least resistance," when correct results can be reached and justice attained. Therefore, if the court can be convinced that the Southern Railway Company at the institution of these proceedings, was doing business in the State of Louisiana (and we may here add parenthetically, in the language of the statute, "**doing any business of any nature whatever in this State**"), and that by its neglect or from any other cause it failed to designate some one of **its own particular choice to act as its representative,** upon whom process could be served, or that it preferred, as the law will presume it did, the selection made by the State itself, as its representative, upon whom process directed against it should be served, then, we submit, that this court is without power or authority to sit as a reviewing tribunal to correct, review, or reverse the judgment of a State court, a court of co-ordi-

nate and concurrent jurisdiction and power and of equal dignity with the Federal Circuit Court.

In our printed argument we have collated the authorities recognizing the validity of legislation of the different States, providing for service of process upon foreign corporations doing business in the State in which it enters. We apprehend upon the correctness of this proposition there will be no serious contention.

And this brings us to the consideration of the evidence and the controlling factor in this aspect of the case and which should be determinative of the jurisdiction of the State court.

Was the Southern Railway Company doing "**any business of any nature whatever in this State**" at the time of the institution by Simon of his suit?

First. We find in the record the statements of Mr. Trufant, representing the St. Charles Hotel Company, and Mr. Rightor, representing the Morris estate, that for years preceding 1904, during the year 1904, and subsequent thereto the Southern Railway Company, through its executive officers, maintained in the city of New Orleans **two offices**, and as the representatives of said company **two officers** (Rec., pp. 270, 271, 272).

Andrews, the ticket agent of the Southern Railway Company, sold and delivered tickets not only over lines connected with the Southern Railway Company, but **sold and delivered** tickets (independently of connecting carriers) over the independent lines of the Southern Railway Company (Rec., pp. 206, 252).

According to the deposition of Simon, which under stipulation is to be treated as his testimony **de bene esse** (Rec., p. 243), Graham, the soliciting freight agent for the Southern Railway Company, makes contracts in the city of New Orleans on behalf and for account of the Southern Railway Company; that he (Simon) has been repeatedly solicited for shipments over its lines and those of connecting carriers,

and that as a matter of fact he has shipped out of the city of New Orleans merchandise and has received from those holding themselves out to be the representatives of the Southern Railway Company bills of lading or receipts for said shipments (Rec., pp. 80-81).

No attempt was made to meet that evidence, nor was Graham called as a witness on complainant's behalf to refute the statement. If he had been, the defendant would have had an opportunity of showing that contracts were made and entered into in the city of New Orleans by Graham, on behalf of the Southern Railway Company, which he represents, and which maintains its offices in this city under the leases to which we have referred.

By the bills of lading introduced in evidence it is shown that shipments out of New Orleans by Simon himself were receipted for by representatives of the Southern Railway Company, and that checks made payable to the order of the Southern Railway Company, in payment for transportation, were indorsed by it and deposited to the credit of the Southern Railway's account in the banks of New Orleans. (See bills of lading or receipts and checks in evidence, Rec., pp. 263-269.)

Second. The condition of the Southern Railway Company's business was indisputably and admittedly the same in August, **1905,** that it was in December, **1904,** when Simon brought his suit (Rec., p. 194). Therefore, if the Southern Railway was not doing "any business of any nature whatever in this State" in December, 1904, up to and including August, 1905, why did it in August, 1905, nominate and appoint **its particular agent** in the State of Louisiana upon whom legal process could be served?

We care nothing for the self-serving declaration contained in the letter of appointment. We are dealing with the abstract fact that in August, 1905, when the condition of this company's business was identical with what it was in December, 1904, why should the Southern Railway Company have designated and appointed an agent in the State of

Louisiana upon whom process could be served? If the Southern Railway Company was not doing "any business of any nature whatever in this State" in August, 1905, **why** should it have submitted itself, by the appointment of a special agent upon whom process could be served, to the jurisdiction of the courts of Louisiana, and, to repeat, its condition and its operations so far as doing "any business of any nature whatever" in Louisiana were the same in December, 1904, as they were at the time that it selected and appointed its local representative in August, 1905 (Rec., p. 273).

We can explain the absence prior to August, 1905, of a specially designated agent upon whom process could be served, by the Southern Railway Company, upon the **theory:**

That, being advised of the passage of act 54 of 1904, they were content to allow the State of Louisiana to designate for it the Secretary of State as its representative, upon whom process should be served.

It is immaterial to the plaintiff, and to the validity of his judgment, whether the process was served upon the agent of their **implied choice,** the Secretary of State, purposely or through their failure to designate some other person than the State's selected agent, upon whom the process could have been served. Suffice it to say, that the plaintiff in asserting his rights in the courts of Louisiana strictly pursued the law subjecting the corporation to the jurisdiction of the court by service of process upon the company's **only legal** representative in the State of Louisiana. (See our brief in this court, p. 68.)

Is the Southern Railway Company doing "**any** business **of any nature** whatever in this State?" Independently of what we have already said, the evidence in the record authorizes the statement that at the time of the institution of the Simon suit, since then, and down to this hour they are not doing limitedly "any business of any nature whatever," but they are doing a very large and general railroad

business in this State, and we may be permitted to say that this business is being conducted right under the shadow of this very court-house.

And permit us, at this time, to observe that if the Southern Railway Company was **simply** a stockholder in another railroad corporation (the Terminal Company), without undertaking **to control** the operation of that other railroad corporation, **or without controlling** its administration, and having **no other** relation to the corporation in which it held stock than that resulting from its stockholdings and general traffic arrangements and exchange of freights, it would not be doing **a railroad business** in this State, and that is all that was held in the **Peterson case,** in the **205 U. S.**

But what are the relations of the Southern Railway Company to the New Orleans Terminal Company? Who designates its officers, who controls its policy, for whose benefit is it operated, through what agency does the Southern Railway Company operate the Terminal properties, who receives the revenues earned by the operation of the leased Terminal properties?

It is immaterial what disposition is made of those revenues. The question is, does the Southern Railway Company, within the line of its corporate objects and purposes, do "any business of any nature whatever in this State?"

The Terminal Company, as it presently exists, is the successor of the New Orleans & San Francisco Railroad Co. The latter company was organized by notarial charter on the 31st day of **December, 1902** (Rec., p. 68). This corporation, with a subscribed capital of $6,000, was subsequently transformed into the New Orleans Terminal Company by notarial act passed on the 30th day of **June, 1903,** with an authorized capital of $2,000,000 (Rec., p. 75). The evidence shows that the capital stock of $2,000,000 of the Terminal Company is owned one-half by the Frisco system and one-half by the Southern Railway Company. (See lease, Rec., pp. 215-218.)

Let it be borne in mind that the charter of the Terminal Company is a notarial charter and not a legislative grant.

Under the terms of the original charter of the Frisco, which was amended as already referred to, the Terminal Company was invested with power and authority to "lease or to sell its lines of railway in whole or in part" to other companies (pp. 69-70-76).

As a railroad corporation, with the powers of expropriation and as a public-service corporation, we need hardly argue to this court that it could not lease its franchises "in whole or in part" without legislative sanction. (See **Thomas vs. R. R., 101 U. S., 80.)**

The charter of the Terminal Company was passed under the directions of distinguished counsel of this bar on the 31st day of December, 1902, and the power conferred upon it to "lease or to sell its lines of railway in whole or in part to other companies" was derived from, and had for its foundation and authority, act No. 74 of 1902, approved July 2, 1902, six months before the charter of the "Frisco" Terminal Co. was passed. That legislative act accorded to all railroads in this State, whether existing under general or special laws of this **or any other** State, the right to "sell or lease" its railroad properties and franchises to any other railroad company duly organized and existing under the laws of this **or any other** State or Territory, "whenever said contracting company **shall or may** form in the operation thereof, by bridge, ferry or otherwise, connecting or continuous line or lines of railroad." * * *

Section 1 of act 74 of 1902. (See also section 3.)

The testimony of Mr. Finley and the statement of Mr. Hall are to the effect that the acquisition by the Southern Railway Company of the Terminal properties had in view the very purpose indicated by the statute in the grant of power to "lease or sell," the ultimate connection between the Southern Railway Company and the Terminal Company's road, rails and facilities at this port.

The only basis upon which the lease between the Terminal Company and the Southern Railway Co. could have been effected is by virtue of act No. 74 of 1902. The law contemplates that the lessor and lessee shall have in view, under the lease to be effected, the formation of a "connecting or continuous line," or that the leased properties "**may** form," in the future, in the operation of the leased road, a "connecting or continuous line or lines." (See act 74 of 1902, sections 1 and 3.)

That at the time the lease was entered into the contracting parties contemplated the existence of the conditions provided for by law is perfectly manifest from the declarations of Mr. Hall, the solicitor for the complainant and at the time one of the Southern Railway Company's directors of the Terminal Company (Rec. p. 66), and of Mr. Finley, the then vice-president of the Southern Railway Company; and before referring to their "declarations" in the record we desire to attract your honor's attention to the answer made by Mr. Finley to the last question propounded, in which he declares that he "was not assisted in preparing these answers, except clerically" (see deposition of Finley, Rec., p. 207), and, secondly, to the "marvelous coincident" in the exactness of expression of Mr. Finley and Mr. Hall.

In Mr. Hall's deposition (Rec., p. 66, which was filed on May 6, 1905), speaking of the relations of the Southern Railway Company to the New Orleans Terminal Company and the cause of the acquisition by the Southern Railway Company of its interest in the Terminal Company, Mr. Hall said that the Southern Railway Company's interest was acquired "**by reason of the development of the city of New Orleans as an important commercial and export point and in anticipation of a possible extension at some future day of the lines of said railway company into this city.**"

Mr. Finley, speaking of the Southern Railway Company's interest in the properties of the Terminal Company and the cause of its acquisition, said it was "**by reason of the devel-**

opment of the city of New Orleans as an important commercial and export point and in anticipation of a possible extension at some future day of the line of the Southern Railway Company into the city of New Orleans.'' (Finley's answer to seventh interrogatory, Rec., p. 200.)

Accepting the statements of both gentlemen as true, they confirm the defendant's contention that the lease of the Terminal property was under the law of 1902, and hence carried with it the mandatory provisions of that statute.

We have no disposition to comment upon the identical language used by both of the gentlemen referred to in the statement of the objects and purposes of this lease beyond the fact that Mr. Finley, in giving his deposition, said he was not assisted, except clerically, in framing his answers.

The statute provides that, when railroads entering Louisiana avail themselves of the provisions of the act authorizing the selling or the leasing of railroad properties, the purchaser or lessee, if a non-resident corporation,

> "shall have and maintain a domicile and main and general office in the State, and be subject to the control and regulations of the laws of this State, and the railroad commission, **as well as the jurisdiction of the State courts.''**
>
> Section 8 of act 74 of 1902.

Now, let us see by what means and in what manner the Southern Railway Company secured control of the properties of the Terminal Company of this city; when it did, how it did, and how it operates it? We find in the contract of **lease** (and so designated) between the Terminal Company and the Frisco and Southern Railway Companies the recital of the fact that the entire capital stock of the Terminal Company is owned in equal parts by the Frisco Lines and the Southern Railway Company; that is to say, that each company owns $1,000,000 of full-paid stock of the Terminal Company. Now, to repeat what we have already said, if the only relation that the Southern Railway Com-

pany had to the Terminal Company was that of a stockholder in the Terminal Company, we should not press upon the court's consideration the determination of the question based on that independent fact whether they were doing "any business of any nature whatever" in Louisiana; but we find that after the Southern Railway Company and the Frisco Company secured control of the entire stock issued by the Terminal Company, they, by virtue of their stockholdings, selected the officers to operate the properties of the Terminal Company (the officers are selected alternately by the lessees) so that each company, the Frisco and the Southern Railway Company, would have representatives in charge of their respective interests; that having been accomplished, the Southern Railway Company and the Frisco entered into a contract of lease with the officials of the Terminal Company (**officials selected by themselves** and who were their representatives and agents) by which they secured control of the Terminal properties for a period of ninety-nine years. The **lessees** alone are invested with the power to sublet to other railroad companies entering into this city the right of way and the use of the Terminal Company's facilities, and each of the lessees must submit its nominee for acceptance to its co-lessee, and each nominated road, when accepted and granted the use of the Terminal Company's facilities, **attorns** to its nominator for the use it makes and the price that it pays for operating over the leased properties.

To illustrate: The Southern Railway Company nominated the New Orleans and Northeastern R. R. Co., and it operates its cars over the Terminal Company's lines. That company (The N. O. & N. E. R. R. Co.) pays direct to the Southern Railway Company the lease rent for the use it makes of the Terminal Company's facilities. (See testimony of Larz Jones, Rec., p. 246.)

It is true that under the contract of lease the expense of operating the Terminal properties is borne equally by the Frisco and the Southern Railway companies, the lessees, and

there is some testimony that up to this time the properties are not self-sustaining.

Although the Southern may not operate direct **trains** over the Terminal properties, it does handle its **cars** through its nominees over the leased lines, and if in future years the source of revenue would be greater than the operating expenses and fixed charges, the resulting profits would inure to the lessees and not to the Terminal Company.

But whether the Terminal properties are presently self-sustaining or not, whether the lease is a profitable one or not, is immaterial. The Southern Railway Company is conducting business through its selected agency, that business being the operation of the Terminal Company's properties, which the Frisco and Southern Railway Company have under a joint lease.

The Terminal Company is nothing more than the "shadow" of the Frisco and Southern Railway companies; it stands in the position of a "holding company" for the benefit of the two lessees, who have an equal amount of stock in the Terminal Company, and it operates the Terminal properties for the lessees' benefit, through the officials selected by the lessees. In the contract of lease it is provided that the lessees shall have the power and authority to extend the terminal properties, and while ostensibly secondary obligors on the bonds it is perfectly evident from the character of the bond provided for that they are primarily liable; the lessees are the sole beneficiaries of these improvements that the lease contemplates and which the record shows are being continuously made.

It is true that out of the earnings, if there are any, the lessees must provide for the interest upon and ultimate retirement of the bonded debt. It is equally true that they receive the entire revenue. We say the entire revenue because the lease provides that the entire rental paid by the lessees to the Terminal Company is **five** dollars ($5) per annum, although the corporation is capitalized at the enormous sum of $2,000,000. But if there could be any

possible question as to who is operating these properties (this "shell and shadow" being manifestly used as a cloak to conceal the real relations), it should be removed at once by reference to the lease and its conditions, which fix the liability upon the lessees for all injuries in operating the Terminal properties and the conditions under which that liability should be ascertained and determined. The contract to which we have referred is, speaking truthfully, as the parties themselves declared it to be, a "**lease**" of the Terminal properties, notwithstanding the declaration of adverse counsel.

Many reasons may be assigned why just enough life was left in the Terminal Company to preserve legally this "shadow" of corporate existence. The railroad terminal facilities of the city of New Orleans have been circumscribed and limited by earlier grants to the Illinois Central, the Southern Pacific, and what was once the N. O. & Mobile, now the Louisiville and Nashville, and other roads.

The Belt Railroad (a public-service corporation owned and operated by the city of New Orleans) made its appearance, and is intended to be for the public's benefit. The river front being practically monopolized, it is with great difficulty that any other system than those presently operating can enter New Orleans. The conditions imposed are so onerous as in a measure to deprive new companies of advantages of terminal facilities. The Southern Railway and the Frisco companies accomplished the advantage of securing primarily to themselves the facilities of the Terminal system. They might have invaded the Federal laws if they had combined to operate directly the Terminal properties and shut out competing railroads, but with this "shadow and shell" of an existing corporation controlled by them they can indirectly accomplish that which, if undertaken jointly and as the real owners of the property, might have resulted disastrously to their interests.

As the Terminal properties stand today, under the contract of lease with the powers conferred upon the lessees

and those reserved to themselves, they come so near infracing the anti-trust law as at least to invite inquiry, which is destined to come whenever a new road seeks to enter here and the action of the Terminal Company's officials shall appear to be arbitrary or oppressive.

But, to get back to our case: We have the Southern Railway Company under the lease, and as the lessee operating through the agency of its own selection, the properties of the Terminal Company, a business in direct line with their own, only operating under a lease and deriving all the benefits from its operation. And we are told that they are not doing "any business of any nature whatever in this State."

Bear in mind that the stock of the Terminal Company, representing all of the assets, is owned by the Southern Railway and the Frisco Companies. Bear in mind that the enjoyment of all the company's properties has been leased to the Southern Railway and Frisco Companies for ninety-nine years at an insignificant rental of $5.00 per annum. Bear in mind that this contract of lease is nothing more nor less than the lease of the Southern Railway and the Frisco to themselves of the properties of the Terminal Company, the entire issue of stock which they hold, and that that lease was made by the stockholders with themselves, for themselves, and the properties operated by themselves, through the officers of the Terminal Company, selected by the lessees and using the name and corporate existence of the Terminal Company as a cloak to their transaction.

The object and purpose of our statute, subjecting foreign corporations doing "**any business of any nature whatever**" to the jurisdiction of the courts of Louisiana, was manifestly to remove from judicial consideration the **indefiniteness** of the character and quantity of business conducted by the foreign corporation, and to fix **definitely** the conditions under which the State courts should have the right to exercise jurisdiction over foreign corporations.

In other words, to escape from the effect of a conflicting jurisprudence as to the right of the State court to exercise its jurisdiction, dependent upon the character of the business conducted by the foreign corporation and to avoid the judicial determination of the question whether the business conducted was general or special, whether it was within the scope, purposes and objects of the charter of the foreign corporation or not, the legislature of this State, in the exercise of its undoubted power permitting by comity the right to a foreign corporation to transact business in Louisiana, provided in express terms that "**any business of any nature whatever**" conducted by a foreign corporation should subject it to the jurisdiction of the courts of this State, and when the foreign corporation enters upon the territory of Louisiana to transact "any business of any nature whatever" it at once voluntarily subjects itself to the jurisdiction of the courts of Louisiana.

The Supreme Court of this State had occasion recently to review the statutes of Wisconsin. The law of that State with reference to service of process on foreign corporations is identical with the law of Louisiana. The Supreme Court held, in a contest seriously waged by Mr. Buck (who happened to be the master in this case), that a judgment rendered by the Supreme Court of Wisconsin, where the solicitor simply delivered the policy of insurance was an agent, within the meaning of the statute, upon whom service could be made, and that a judgment thus rendered against the foreign company was valid and binding.

We call your honors' particular attention and invite your consideration of the case of **Milwaukee Trust Co. vs. Germania Insurance Company, 106 La., 669.**

From the report submitted by Mr. Buck, who was the master in this case, and from whose report counsel for appellee has made exhaustive extracts (Brief of Appellee, p. 67), it is quite evident that the learned master had not been reconciled to the determination pronounced by the court in

that case, which was in harmony with the general jurisprudence of the country.

Farrier *vs.* **N. E. M. & S. Co.**, 88 Ala., 278 (7 So. Rep., 200).
State *vs.* **Bank**, 108 Ala., 3 (18 So. Rep., 533).
Western R. R. Co. *vs.* **Tally Bates Co.**, 50 So., 541.

These decisions have been in terms affirmed by this court in—

Chattanooga Asso. *vs.* **Denson**, 189 U. S., 409.
Board of Trade *vs.* **Hammond Co.**, 198 U. S., 424.
See **Denver R. R. Co.** *vs.* **Roller**, 100 Fed. Rep., 738.
Bell *vs.* **N. O. & N. E. R. R. Co.**, 59 S. E. Rep., 102 (Ga.).
Cent. of Ga. *vs.* **Eichberg**, 68 Atl. Rep., 690 (Md.).
Norton *vs.* **Atch., T. & S. F. Co.**, 61 Fed. Rep., 618.
Tuchband *vs.* **C. & A. Ry.**, 115 N. Y. Rep., 437.
So. Pacific *vs.* **Allen**, 105 S. W. Rep., 441.
So. Pacific *vs.* **Godfrey**, 107 S. W. Rep., 1135.

The cases cited were decided in the State courts, or were cases removed from the State courts, where the circuit courts of the United States followed the decisions of the State courts on the question of doing business and on the proper agent to be served, and reached the conclusion that solicitation is doing business within the terms of the statute. They show that the State courts interpret their own statutes and lay down the rule that when a foreign corporation does "any" business, even the mere solicitation of freight and passengers, they are subject to the jurisdiction of the domestic State, so that judgment **in personam** can be rendered against such foreign corporations; they show that the State courts consider that certain modes of service **may be entirely sufficient for State purposes**, even though more stringent rules are laid down by the Federal courts in proceedings **originally** instituted in those courts.

Two recent cases from the State of Texas well illustrates the **dictum** of Mr. Justice Moody in the Green case with reference to cases brought in State courts where the court undertakes to interpret the statutes of its own State.

As was said by Mr. Justice Neill, in the case of **Southern Pacific** *vs.* **Allen,** 106 S. W., 441, at page 443:

> "It is contended by the second assignment that the court erred in not sustaining defendant's plea to its jurisdiction. It being undisputed that the Southern Pacific Company is a foreign corporation and that plaintiff's cause of action **arose in Arizona,** the question was whether the company operated a railroad, did business in, or had an agent or representative in El Paso, when the suit was brought and process served. **This was a question of fact for the jury, or the court sitting as a jury, to determine. Audenried** *vs.* **East Coast Milling Co.** (C. C.), 124 Fed., 697. There being evidence tending to support the finding of the trial judge upon the issue, it is not within our province to disturb it. While the evidence introduced pro and con upon the issue is much similar to that in the case of **Peterson** *vs.* **C., R. I. & P. Ry. Co.,** 205 U. S., 364 (27 Sup. Ct., 513; 51 L. ed., 851), it was directed in that case to a motion made by the defendant to quash the service. **In this case the question is one of jurisdiction of the State court, which depends upon the interpretation of the State statute under which it is asserted.** This, it would seem from the opinion in **Green** *vs.* **C., B. & Q. R. Co.,** 205 U. S., 531 (27 Sup. Ct., 595; 51 L. ed., 917), **differentiates the cases. A State court must necessarily construe the law and determine the facts upon which its jurisdiction depends;** and if, in the exercise of this duty, its action is questioned by a Federal court, it may, unless it involves a principle controlled by the Constitution of the United States, reply in the language of St. Paul: 'Who are thou that judgest another man's servant? To his own master he standeth or falleth.' The case in hand cannot, as to the question under consideration be distinguished in any manner from that of **Southern Pacific Company** *vs.*

> **Cranmer**, 101 S. W., 534, and we can perceive no reason why we should not adhere to our opinion in that case."

See, also, **Sou. Pacific** *vs.* **Godfrey**, 107 S. W., 1135.

Circuit Judge Noyes, recognized by the profession as one of the most distinguished of the Federal judiciary, having recently occasion to consider the effectiveness of service of process upon a non-resident corporation doing business in the State of New York, under facts and circumstances not as strong as those disclosed by the record in this case, and reviewing the decision of Mr. Justice Moody in **Green** *vs.* **Chicago, etc., Ry. Co.**, said:

That although that case held that the solicitation of business did not constitute doing business **within the Federal rule**, it was

> "distinguished upon the ground that there were cases **(Denver** *vs.* **Roller, Tuchband** *vs.* **Chicago, etc., Ry., supra)** in which the action was brought in the State court and the question related to **the interpretation of State statutes** and the jurisdiction of State courts. In the **Denver case** the question was raised as in the present case, in the circuit court, **after removal.**"

In this case, the motion to set aside the summon and the service was denied. The court made the distinction between a case originally **brought in the State court and removed** to the Federal court and **a case originally brought in the Federal court.**

In the first instance, the finding of the State court as to service is regarded as conclusive, while the Federal court would apply the rule in the **Green case**, if the action was originally instituted in the Federal court.

We cite this case for the purpose of establishing the doctrine that the State court's finding of fact that a foreign corporation is doing business in the State, and that service upon either its selected or accredited agent is the basis of the

State court's judgment, and is conclusive in the Federal court.

In the case at bar it must be remembered that Simon filed his suit in the State courts of Louisiana; that in that suit he alleged that the Southern Railway Company was doing business in Louisiana; that a trial was had on this issue in the State courts of Louisiana, and that the judgment recites that the cause of action was "**proved;**" that verdict and judgment found, 1st, that the Southern Railway Co. was doing business in Louisiana; 2d, that the mode of service following the Louisiana statute was a sufficient, valid and legal one; the action in the case at bar is an attempt to review the questions of fact decided by the State court, both on the questions of service and the cause of action, **by an independent injunction bill,** restraining Simon from executing his judgment. No action of nullity was ever brought in the State court; no action of nullity has been brought in this court, even if one could be sustained here (see **Barrow** *vs.* **Hunton,** 99 U. S., 80; **Nogue** *vs.* **Clapp,** 101 U. S., 551); the prayer of complainant's petition does not seek the nullity of the judgment of the State court, but is for an absolute injunction, restraining Simon from executing his judgment rendered according to the laws of the State of Louisiana.

If the words of Justice Moody in **Green** *vs.* **Chicago, Burlington & Quincy R. R. Co.** mean anything when he says, "but the above cause of action **was brought in the State court,** and the question was of the interpretation of the State statute and the jurisdiction of the State court" (quoting **Denver** *vs.* **Roller,** 100 Fed., —, and **Tuchband** *vs.* **R. R.,** 115 N. Y., —), they certainly mean that the judgment of the State court **interpreting its own statutes and determining its own jurisdiction** must be held inviolate, and that the judgment rendered by the State court must be given full faith and credit under the Federal Constitution.

As to the question of agency, while in the cases above cited service was made upon some managing clerk or other agent soliciting freight and passenger business, the law

makes no distinction when the service is made upon an official so designated by the State statute where the foreign corporation does not appoint one for the purpose of receiving service of process.

The final analysis of Justice Moody's opinion in the **Green case** removes all limitations and makes each case depend on the facts. He says:

> "Without undertaking to formulate any general rule defining what transactions will constitute 'doing business' in the sense that liability to service is incurred, we think that this (simple solution) is not enough to bring the defendant within the district so that process can be served upon it."

Assuming that the Federal rule is that the mere solicitation of business does not subject foreign railroad corporations to its jurisdiction when suit is brought in the United States courts, the present case certainly does not come within that rule, because it is admitted by the president of the Southern Railway Company that Mr. Andrews sells tickets to purchasers in the city of New Orleans for passage not only through connecting carriers, but directly over the lines of the Southern Railway in other States (Rec., p. 206), and receives the money therefor, and places it in bank for the account of the Southern Railway Company (Rec., p. 269); and, likewise, Graham, the freight agent, through Mr. Bynum, issues bills of lading or receipts for transportation of freight over the lines of the Southern Railway (Rec., p. 263 *et seq.*).

Independently of the maintenance of offices in this city by the Southern Railway Company and the business transacted here through its local agencies, no one can read attentively and intelligently the contract of lease between the Terminal Company and the Southern Railway Company and hesitate in arriving at the inevitable conclusion that, under the lease, the Southern Railway Company is, through its own agency—"the Terminal Company"—doing business

in the city of New Orleans, and when all the facts developed in this case are crystalized and presented in a concrete form who can say, in the face of such overwhelming proof, that the Southern Railway Company was not doing "any business of **any nature** whatever" in this State.

The statute of Louisiana is more comprehensive and broader in its terms with reference to foreign corporations than the statutes of any other State that has come under our observation. It covers the doing of any "**business of any nature whatever in this State,**" and the Federal courts have maintained their jurisdiction over foreign corporations in instances of isolated transactions.

Mr. Justice Day, in **Commercial Co.** *vs.* **Davis,** 213 U. S., p. 245, said:

> "Previous cases in this court have not defined the extent of the business necessary to the presence of a foreign corporation in the State for the purpose of a valid service; **it is sufficient if it is doing business therein.** We are of the opinion that the finding of the court in this case is supported by testimony and that the corporation was doing business in Missouri."

The service of process in the case cited was made upon Dr. Mason, who went into the State of Missouri at the solicitation of the beneficiary with the view to adjust a loss arising out of a policy of insurance issued by the plaintiff in error. The record disclosed the fact that Dr. Mason had authority from the company to adjust and settle the loss. The loss, however, **was not adjusted** or settled. The statute under which process was served upon Dr. Mason provided that it may be made upon "any person within the State **who adjusts or settles the loss.**" The court in construing the statute said that it was intended to reach one having the authority of the company for the purpose named, and that it was immaterial that the loss was not actually settled.

See **Slecher** *vs.* **Pullman Co.,** 170 Fed. Rep., 366.

In **Harvester Co.** *vs.* **Kentucky,** decided by this court on

June 22, 1914, Mr. Justice Day, as the organ of the court, reviewed the earlier decisions and held that the solicitation of orders for merchandise by local agents of a non-resident corporation which are sent to another State to be filled—the articles ordered being delivered within the State and the local agent authorized to receive payment therefor—"amounts to doing business in the State to the extent which will authorize the service of process upon its agents thus engaged." With all the limitations which the Harvester Co. sought to impose upon their solicitors and the restrictions upon their qualified agency, this court held that the Harvester Co. could not evade the jurisdiction of the State court where, through its local agents, it solicited business. The Green case was commented upon and differentiated. The doctrine of that case was held to be "extreme," and while not departing from it, the court was not disposed to extend it. We submit that upon the record, upon the authorities, and upon principle the finding by the Circuit Court of Appeals (and this in harmony with the circuit court and the State court) that "at the time the petition was filed in the State court by the appellant to recover damages of the appellee, to wit, December 1, 1904, the latter was doing business in the Parish of Orleans, State of Louisiana" (Rec., p. 310), was indisputably and absolutely a correct finding.

The Attack upon Act 54 of 1904.

On page 96 of appellee's brief the constitutionality of act 54 of 1904 is assailed. After referring to a number of decisions that are without the remotest application in principle to the instant case, the learned counsel concluded the discussion on this question by saying:

> "On the authority of these decisions we respectfully submit that if the alleged service of process made in this case was the service contemplated by Louisiana act 54 of 1904, then Louisiana act 54 of 1904 is unconstitutional, because it **contemplates** the

> condemnation of a defendant without a hearing. Such a condemnation would be a denial of due process of law * * *. A defendant so condemned could legally invoke the jurisdiction of the Federal court on grounds of diverse citizenship to enjoin his opponent from proceeding to seize his property under such a void judgment."
>
> Appellee's Brief, p. 101.

In candor and fairness, act 54 of 1904 "**contemplates**" the service of process upon all foreign corporations doing business in Louisiana, and thus affords them the opportunity to be heard in their defense. The statute in terms directs foreign corporations doing business in the State to name "its agent or agents or other officer in this State upon whom process may be served."

Sec. 1 of act 54 of 1904.

The second section of the act provides that when a foreign corporation "doing any business" in the State, "of any nature," without having **designated** an agent, in obedience to the requirements of section 1, "service of process in such suit may be made upon the Secretary of State, the same and with the same validity as if such corporation had been personally served."

The Southern Railway Co., by failing or neglecting to designate or appoint a particular person as its agent upon whom process could be served, was, (as a foreign corporation doing business in Louisiana,) fully advised that the State would select an agent to represent it, upon whom process **could** be served. Therefore, under the conditions stated, the Secretary of State became its duly accredited agent for the service of process, and it was clearly the duty of the Southern Railway Co. to instruct and direct **its statutory agent** what disposition to make of process directed against it and served on him. (See Appellant's Original Brief, p. 68.) So much for what the learned counsel says the statute "contemplates."

The Constitutionality of the Act.

Assuming that the question could properly be raised in these proceedings, **before this court could be called upon to consider the constitutionality of this legislation, it must be fully advised by the pleadings that the question has been properly raised.**

Complainant's bill only questions the **constitutionality** of act 54 of 1904, when sought to be applied to foreign corporations **not** doing business in Louisiana.

The complainant's attack is upon the jurisdiction of the State court, **ratione personæ,** and the **court's action** in rendering a judgment against a foreign corporation **not doing business** in this State, and therefore not within the terms of the statute.

In other words, the gravamen of complainant's bill is that act 54 of 1904 **is without application to the complainant**, and that any service upon complainant under that act is ineffectual, because it is a **foreign** corporation and **does no business** in the State of Louisiana. Therefore, the inapplicability of the statute.

We cannot impress upon the court too forcibly the fact that **no attack** is made upon the **statute itself** as being in contravention of any article of the Federal Constitution, and the jurisprudence of this court is uniformly to the effect that if a statute is attacked as unconstitutional the pleader must set forth in legal form and by specific allegations wherein the statute is an infringement of or is repugnant to the Federal Constitution.

See **Hanford** *vs.* **Davis,** 163 U. S., 279.

Mr. Justice Day, in **Southern Railway Co.** *vs.* **King,** 217 U. S., 534, said:

> "It is the settled law of this court **that one who would strike down a State statute** as violative of the Federal Constitution, **must bring himself by proper averments and showing** within the class as to whom the act thus attacked is unconstitutional. He must

show that the alleged unconstitutional feature of the law injures him and so operates as to deprive him of rights protected by the Federal Constitution. **(Tyler** *vs.* **The Judges,** 179 U. S., 406; **Turpin** *vs.* **Lemon,** 187 U. S., 51, 60; **Hooker** *vs.* **Burr,** 194 U. S., 415; **Hatch** *vs.* **Reardon,** 204 U. S., 152, 160.)"

Applying the principles announced to the complainant's bill, the legislation which is now the subject of consideration is free from attack, and therefore the court, under the well-settled jurisprudence, ought not to pass uninvitedly upon its constitutionality.

Pretermitting the question of specially pleading, in what specific respect the statute is repugnant to the Constitution, the Federal and State courts have uniformly held such statutes valid.

Where the statutes of the several States direct, under certain conditions, service of process on designated public officials, subjecting non-resident corporations doing business in the State to the jurisdiction of the courts, it is exceptional for the statute to direct the disposition of the process by the official served.

The corporation by its inaction accepts the State's designation and selection of its agent, and it is to be presumed that the corporate officials have instructed the designated official what his duties are in connection with process running against it, and its failure to do so is its own neglect.

In none of the cases to which our attention has been attracted has the constitutionality of this class of legislation been questioned on the ground advanced by the learned trial judge and counsel in this case.

As we have already observed, the attack is not on the constitutionality of the **legislative act,** but upon Simon's **action** to subject the Southern Railway Company to the jurisdiction of the State court.

From an "avalanche" of cases we have made the following selections, and which we submit are decisive of the question.

In the case of **Ehrman** *vs.* **Teutonia Insurance Company,** 1 Fed. Rep., 475-78, the court, speaking through Mr. Justice Caldwell, said:

> "The leading provision for the protection of the policy-holder is contained in section 3561. This section is a literal copy of the Pennsylvania statute. (See **Ex parte Schollenberger,** 96 U. S., 369-374, where it is set forth at length in the opinion of the court.) So much of it as is material to this case reads as follows: 'No insurance company, not of this State, nor its agents, shall do business in this State until it has filed with the Auditor of State of this State a written stipulation, duly authenticated by the company, agreeing that any legal process affecting the company, served on the Auditor of State, or the party designated by him, or the agent specified by said company to receive service of process for the company, shall have the same effect as if served personally on the company within this State.'
>
> "The Supreme Court of the United States, speaking of a similar provision in a statute of Ohio, say: 'We find nothing in this provision either unreasonable in itself or in conflict with any principle of public law. It cannot be deemed unreasonable that the State of Ohio should endeavor to secure its citizens a remedy, in their domestic forum, upon this important class of contracts made and to be performed within that State and fully subject to its laws; nor that proper means should be used to compel foreign corporations, transacting this business of insurance within the State for their benefit and profit, to answer there for the breach of their contracts of insurance there made and to be performed.' **Lafayette Ins Co.** *vs.* **French et al.,** 18 How., 404.
>
> "And in a later case the court say that if there could be no legal redress short of the seat of the company in another State, the cost of the remedy would in most instances exceed the value of its fruits, and the result would be, to a large extent, immunity from all legal responsibility. **Railroad Co.** *vs.* **Harris,** 12 Wall., 65.
>
> "By the provisions of section 3561 every insurance

company of another State is required to stipulate in terms that service on the auditor shall be service on the company. If the stipulation is filed service may be on the auditor, or the person designated by him, or the agent designated by the company, at the election of the plaintiff. **Cunningham** *vs.* **Southern Express Co.**, 67 N. C., 425. And if the auditor does not designate a party, and the company does not specify an agent, then the auditor alone is the proper person to serve with the process, and such service binds the company.

"That the stipulation was not, in fact, filed with the auditor is of no consequence if the company has done those things which imposed upon it the obligation and duty to file it.

"**The law deduces the agreement on the part of the company to answer in the courts of this State, on service made upon the auditor, from the fact of its doing business in the State; and the presumption, from that fact, of assent to service in the mode prescribed by the statute, is conclusive, and no averment or evidence to the contrary is admissible to defeat the jurisdiction.** The reason of this rule is that the obligation to file the stipulation is imposed for the protection of the citizen dealing with the company, and when, by its own act, its obligation to file the stipulation is perfect, as between the company and the citizen, the company will not be permitted to relieve itself from a liability which the written stipulation would have imposed by pleading its own fraud on the law of the State and her citizens. In such cases the law conclusively presumes that to have been done which law and duty and the rights of the party contracting with the company require to be done. It is a familiar principle that jurisdiction cannot be acquired by fraud, nor can it be evaded by such a fraud as is here attempted to be set up.

"The maxim that no man shall take advantage of his own wrong is as applicable to corporations as to natural persons, and applies as well to the kind of agreement under consideration as to any other.

"Insurance companies incorporated by the laws of one State have no absolute right to do business in

another State, without the consent, express or implied, of the latter State.

"This consent may be given on such terms as the State may think fit to impose, and these conditions are binding on the company, and effect will be given to them in the courts of all the States and the United States. **Lafayette Ins. Co.** *vs.* **French,** 18 How., 404; **Paul** *vs.* **Virginia,** 8 Wall., 168.

" 'One of these conditions may be that it shall consent to be sued there. If it do business there, it will be presumed to have assented and will be bound accordingly.'

"**Railroad Co.** *vs.* **Harris,** 12 Wall., 65.

"The principle established in the case last cited has been affirmed in later cases. **Railway Co.** *vs.* **Whitton,** 13 Wall., 270, 285; **Ex Parte Schollenberger,** 96 U. S., 369; and see **Hayden** *vs.* **Androscoggin Mills,** 1 Fed., 93; **Albright** *vs.* **Empire Pr. Co.,** 18 Albany L. J., 313, S. C., 6 Rep., 673; **Wilson Packing Co.** *vs.* **Hunter,** 7 Rep., 455.

"Upon the admitted facts of this case service upon the auditor was good personal service on the company, and it must appear, or suffer a judgment by default."

The Arkansas statute, which is a literal copy of the Pennsylvania statute, the validity of which was passed upon by this court in **Ex Parte Schollenberger,** 96 U. S., 369-74, is in all essentials like that of act 54 of 1904, in that it provides that a foreign corporation may not do business in the State until it has filed a certain stipulation with the auditor, and upon its failing so to do, the auditor shall become the statutory agent upon whom process may be served, as if by personal citation, and the statute is silent as to what disposition the auditor shall make of the process when served.

In the case at bar the statute requires that a foreign corporation doing business in Louisiana must designate an agent. Upon its failure to designate an agent and comply with the law with reference thereto, service upon the Secretary of State is made as effective as if upon the company itself.

The case of **Knapp, Stout & Co.** *vs.* **National Mutual Fire Insurance Company,** 30 Fed., 607, is one where the statute of Missouri prohibited foreign insurance companies from carrying on business in Missouri until it had filed with the Insurance Commissioner a certificate stipulating that service might be made upon him.

The court, Mr. Justice Brewer, said:

> "**In these cases a default is asked.** The petition alleges that the defendant is a foreign insurance corporation doing business in this State, having agents and officers located here. **Service was made upon the Insurance Commissioner. He declined to receive the summons and copy of the petition that was handed to him, no reason being given therefor.** The service was good if he had power to receive the service. The law of Missouri forbids any foreign insurance company doing business until it has filed with the Insurance Commissioner a certificate stipulating that service upon him shall be personal service upon the company. As it is alleged in the petition that the company was doing business in this State, having agents and officers here, we are to presume that it has complied with the law; and, therefore, **prima facie,** at least, the service is good, and default will be entered."

In our original brief (p. 75) we listed a large number of selected cases of this court, of the Inferior Federal Courts, and the State courts, all holding with perfect unanimity the constitutionality of this class of legislation, and so firmly is the doctrine established and enforced that it is somewhat surprising at this time to hear it questioned, and particularly before this court.

See opinion of Mr. Justice Day in **Inter. Harvester Co.** *vs.* **Kentucky,** decided June 22, 1914.

Act 54 of 1904 has been the subject of consideration by the Supreme Court of Louisiana.

In **Davis** *vs.* **Kenefick,** 121 La., 251, the court held that a foreign corporation doing business in Louisiana may be sued

in any parish where it transacts business if the written declaration of the foreign corporation does not strictly comply with the requirements of the statute.

In that case the company designated St. Landry as its domicile and appointed Francis as its agent, "but failed to mention the other places in the State where it was doing business." Its failure to comply with the requirements of the statute carried with it as a consequence liability to be sued in any parish where it did business, and the court held that it was bound to give effect to the statute.

The facts in the case cited would seem to have invited the consideration of the constitutionality of the statute, inasmuch as this foreign corporation had actually designated its domicile and its agent, and still was held suable in another jurisdiction, and that process served there was effective.

In **Gouner** *vs.* **Missouri Bridge Co.,** 123 La., 966 (referred to in Appellee's Brief, p. 97), there are some **dicta** which, in consequence of their inapplicability to the facts, are without force.

The facts in that case were that the corporation was **not doing business** in the State at the time of the service of process and had no property in the State.

In delivering his opinion Chief Justice Breaux said:

> "The first question which attracted our attention was whether legal service can be made through the Secretary of State **after** a foreign corporation, **temporarily present at one time in the State, had left, and had taken with it all of the holdings it had in the State.** When we will have determined that point, **there will be little else left for decision.**"

Further on he said:

> "It does not follow from the language that it was in contemplation of the legislature that a company might be sued if it **had left** the State **and had left nothing in it of its own.**"

This was all that the court was called upon to decide, and this was all **that was decided** by the court. The validity of the statute as applied to foreign corporations **doing business** in the State **was not questioned,** and could not be, inasmuch as the court found that at the time of service the defendant company **was not** doing business in the State.

The sixth point of the syllabus **prepared by the court** expressly excludes the consideration of the constitutionality of the statute. It reads:

"Point Not Determined."

> "There is no necessity of passing upon the other point, attacking the constitutionality of the statute, as relates to corporations **carrying on business in the State,** when service is made."

Upon the record it cannot be seriously controverted that the Southern Railway Company was doing business in this Parish and State at the time of service of process. It maintained, under contracts of lease with the officials of the railroad company, two offices, and had in the State two officers transacting business for them.

Independently of this fact they were the lessees of the terminal properties in the city of N. O. and operating them through their selected agency. The lease rent from the terminal property was in part accounted for to it under the conditions of the lease. So there can be no question that they were doing business and doing business without a designated agent upon whom process could be served. When the Southern Railway Co. leased the terminal properties it voluntarily submitted itself to the jurisdiction of the State courts (see sec. 8 of act 74 of 1902), to the operation of the statute under which the lease was sanctioned and to the selection of the Secretary of State, as its agent upon whom process could be served.

If the complainant was **not doing business** in the State, nor the lessee of the terminal properties at the time of the

service of process, then it is immaterial to this court whether the act No. 54 of 1904 is or is not constitutional.

It is only upon the determination of the question that the complainant **was doing business,** as the **lessee of the terminal properties,** that this court would be justified if the question could be properly raised in these proceedings to inquire into the constitutionality of this statute.

We again call to the court's attention the recitals of the bill.

The **gravamen** of complainant's bill is that the statute of 1904 was without application to a foreign corporation **not doing business in this State;** that the court had no jurisdiction for the reason recited in the bill, that the complainant **was not doing business** in this State.

There is no averment that if the complainant was doing business that the statute under which service was had is in any respect repugnant to the Federal Constitution.

The Service of Process under Act 54 of 1904.

The Circuit Court of Appeals pitched its entire decision against appellant upon one single point that is **ultra petitionem**—to wit, that the service of citation in Simon's suit in the State court was made on the **Assistant** Secretary of State, and that, hence, it was a method of service not authorized by the letter of the statute of the State of Louisiana, and was, therefore, ineffectual and void. The mode and manner of service of citation **is patent on the face of the record of Simon's suit in the State court.**

It is true that act 54 of 1904 of Louisiana directs the service of process upon the Secretary of State, but the universal and undoubted rule of interpretation with reference to such statutes and statutes *in pari materia* is that the process is to be served on the *office of Secretary of State, and not* upon the *person* filling the office. *Process is directed to the office of the Secretary of State, and not to the individual holding that office.*

The office of Secretary of State in Louisiana is created by the constitution of the State, and the Assistant Secretary of State is a constitutional officer (article 79), with delegation by the constitution of *"authority to perform all the acts and duties of the office of Secretary of State"* (*Ibid.*). So that, under the constitution of Louisiana, the duties of Secretary of State are charged upon both the Secretary of State and his lawfully appointed assistant. And, therefore, service of process upon the Assistant Secretary of State is the service of process upon the Secretary of State, and, therefore, is a compliance with the requirements of act 54 of 1904, directing, under the conditions recited in the act, the service upon the Secretary of State, that is, the office, and not the man.

Aside from the constitutional provision making the Assistant Secretary of State a constitutional officer, and charging him with all the duties of Secretary of State, the statute law of this State, enacted before the adoption of the present Constitution, authorized the appointment of the Assistant Secretary of State, who was

> "fully authorized to perform all or any of the duties or official acts required by law of the Secretary of State during the sickness *or absence for any cause of the latter.*" * * *
>
> Rev. Stats. of 1870, sec. 3523.

The sheriff's return here recites that at the time of service upon the Assistant Secretary of State, John T. Michel, the Secretary of State, "was absent." That fact is not questioned, and is concluded by the finding of the jury and the judgment of the State court. The validity of the service under the constitution and laws of Louisiana was the basis of the State court's jurisdiction to implead a foreign corporation doing business within the State without any *designated* agent. It is unthinkable, as a legal proposition, that the legislature of the State, in providing for service of process upon foreign corporations doing business in Louisiana without such designated agent, in order to subject them

to the jurisdiction of the courts through service of process upon the *office* of Secretary of State, was called upon to incorporate in the statute pre-existing laws authorizing service upon his *constitutional assistant,* duly appointed and qualified, and charged with all the duties of his office, or that it was called upon to recite at length in the statute that which was already the law, independently of the Constitution, that, in the absence of the Secretary of State, service might lawfully be made upon the Assistant Secretary of State.

We submit that, when the constitution of the State and the laws of the State charge the duties of the office of Secretary of State upon his duly appointed Assistant, the service upon such Assistant Secretary of State is, within the terms of the Constitution and the statute, a service upon the Secretary of State.

The Supreme Court of Louisiana, in interpreting the statutes of the State in relation to the duties of the Assistant Secretary of State, has held that the Assistant Secretary of State is charged with the duties of the Secretary of State, and is, when discharging the duties required of him, the Secretary of State.

State *vs.* **Clark,** 46 La. An., 1409.

The bill of complaint in this case, paragraph 5 (Rec., pp. 3, 4), makes it quite clear that, in the opinion of the solicitor who prepared the bill, it was tantamount to the same thing *in fact* and *in law* to serve process on the Assistant Secretary of State as to serve it on the Secretary of State.

The exact language of the bill in that regard is as follows:

> "That said suit was entered in the Civil District Court for the Parish of Orleans, and a citation issued therein and was served on the Assistant Secretary of State of Louisiana on December 3, 1904, said Simon maintaining that your orator was a foreign corporation, doing business in the State of Louisiana, which had not filed in the office of the Secretary of State a written declaration setting forth the locality

> of its domicile and the place or places in this State where it is doing business, and had failed to name an agent upon whom process might be served; and claiming that, by reason thereof and by virtue of act No. 54 of 1904 of the Acts of the General Assembly of the State of Louisiana, he was, in such case and by reason of such omission, *justified in serving said citation on the said Secretary of State.*"

The court will also note the literal terms of the following sentence of paragraph 6 of the bill (Rec., p. 4):

> "And your orator avers that the attempted service of said citation upon the *Secretary* or *Assistant Secretary of State* of Louisiana was not a citation upon your orator," etc.

And the bill proceeds (in the same paragraph) to aver that the act of the legislature of the State, *No. 54 of 1904*, providing for such form of citation, if intended to operate upon a corporation not "transacting business within the limits thereof, and has no agent therein," would be an attempted regulation of interstate commerce by the State, in violation of the Constitution of the United States.

Complainant sought in its bill to seize the jurisdiction of the Federal Court *ratione materiae* by specious averments of fraud—first, that Simon obtained his judgment by false swearing; and, second, that Simon obtained his judgment by falsely alleging and pretending that the Southern Railway Company *was* doing business in Louisiana, while (as complainant alleged) it *was not* doing business in Louisiana, and, hence, that the Southern Railway Company did not come within the purview of act 54 of 1904, and that the mode of service provided by the Louisiana statute *for such cases* did not apply to complainant.

These averments of fraud, as results proved, were merely specious and colorable. We say *colorable*, first, because the Master found that Simon committed no fraud whatsoever; and, second, the Circuit Court of Appeals found that the

Southern Railway Company *was* doing business in this State at the time Simon instituted suit.

These two facts being found in the defendant Simon's favor, the bill is stripped of all equitable grounds, and the jurisdiction *ratione materiae* of the circuit court, sitting as a court of equity, is left barren.

Wherein, then, lies the power of the circuit court, sitting as a court of equity, to enjoin the execution of a State judgment on a purely *legal* ground—namely, on a refined technical construction of act 54 of 1904 as to whether service was made upon the Secretary of State or upon the Assistant Secretary of State? What equitable ground or what equitable theory can be invoked by a Federal court deciding a question of purely *State law?* Upon what basis of equitable jurisdiction can the extraordinary writ of injunction, the most powerful arm of a court of equity, be invoked to grant relief against the execution of a State judgment on legal grounds?

When a party comes into equity he must, in order to obtain relief, show an equitable cause of action, and when he fails in his proof his bill must be dismissed; yet in this case complainant utterly failed to establish its case of alleged fraud against Simon. Both of the averments of complainant's bill relating thereto have been found in favor of the defendant Simon, and yet—wonderful to say and remarkable to relate—after winning his case on the *merits of the bill,* Simon today stands enjoined from executing his judgment because the court has decided a technical moot question of State law in the case against him—namely, that service was made upon the Assistant Secretary of State, instead of upon the Secretary of State—and that decision, too, determined without a word of reference to the constitution of Louisiana, showing the duties of the Assistant Secretary of State as a constitutional officer, and without a word of reference to the statutes of Louisiana, which likewise define his powers.

The court must bear in mind that the bill of complaint contains no allegation that the service upon the office of the Assistant Secretary of State was collusive as between Simon and the Secretary of State, nor could such an allegation have been made. Hence, without a vestige of equitable jurisdiction left in the bill, the court, after finding all the basic facts on the subject of fraud in defendant's favor, instead of at once dismissing the bill, actually has allowed an injunction not justified, we submit, by a single authority cited in its opinion. Nor could such an authority be cited from the English or American courts of equity, which have never permitted the courts of one sovereign, by an independent injunction bill, to grant relief from the judgment entered by the court of another sovereign on the narrow, technical, legal ground of an alleged formal defect in citation, and that independently of the prohibition of section 720 of the United States Revised Statutes.

The case at bar is, we submit, on all-fours with Railway *vs.* Burke, 66 Fed., 83, 88; Blythe *vs.* Hinckley, 84 Fed., 246; Barrow *vs.* Hunton, 99 U. S., 80; Nougue *vs.* Clapp, 101 U. S., 551.

The whole *gravamen* of the bill, and of all of the affidavits, jurats and depositions in the record, we submit, makes certain the fact that it was the *deliberate policy* of the corporation, not to *appear* to be doing business within the State of Louisiana, and not to *appear* to have any *representative* or *agent* within the State upon whom citation or other process could be served; *the bill makes no point whatever of service on the Assistant Secretary of State instead of on the Secretary of State* and the master who originally volunteered this theory when confronted with the constitutional and statutory provisions admitted that if the "absence" of the Secretary of State vested the official functions in his assistant then the service was valid and effective (Rec., p. 164).

The learned counsel for complainant places great reliance upon the decision of the Nevada courts in the case of Lonkey

vs. Keyes Silver Mining Company, 17 L. R. A., p. —. At the outset it is to be observed that that was a decision of the Supreme Court of Nevada, acting upon the record of one of the inferior courts of that State, and it was brought to the Supreme Court of the State by appeal. That court, in passing upon the service (which after all was only an incidental question in the case), interpreted its own statutes, and when an examination is made of the constitution of Nevada and the statutes authorizing the appointment of an Assistant Secretary of State, and the duties with which he is charged, it is perfectly plain that he was not authorized to act for the Secretary of State, except in the performance of "ministerial duties." That is the limitation of the statute.

The office of Secretary of State is created under article V, section 19, of the constitution of Nevada. Under section 20, "The Secretary of State shall keep a true record of the official acts of the legislature and executive departments of the Government, and shall, when required, lay the same, and all matters relative thereto, before either branch of the legislature."

The duties of his office are particularly enumerated in the act concerning the office of Secretary of State, approved February 14, 1865, and embodied in the compiled laws of Nevada, under section 1929 *et seq.* Under section 14 of that act (now 1939, Revised Laws) it is provided: "The Secretary of State shall have power under his hand and seal to appoint a deputy who may during the absence of the Secretary of State from the office, *perform all the duties of a ministerial nature* belonging to the office;" * * *

It is perfectly evident from the statutes that the Deputy Secretary of State of Nevada possesses no power and is without authority to "represent the Secretary of State in his absence," except in the discharge of ministerial duties, while under the laws of Louisiana, the Assistant Secretary of State is, in the absence for any cause of the Secretary of State, invested with authority to perform *all the acts and duties of the Office of Secretay of State* (Rev. Stat., 3523).

Therefore, we submit that the service upon the Assistant Secretary of State in the absence of the Secretary was an effective service, sufficient to subject the Southern Railway Company to the jurisdiction of the State courts, and the State courts' interpretation of the statute is conclusive here under the doctrine announced by this court in the case of Green *vs.* Railway, 205 U. S., 530.

See

Hanover Bridge *vs.* United States, 221 U. S., 206.

A Review of Appellee's Authorities.

On pages 24 and 25 of the brief appellee quotes in black-letter type a **dictum** from **Marshall** *vs.* **Holmes,** 141 U. S., 596, to the effect that an injunction directed to **a party in a suit** at law to enjoin such **party** from enforcing a judgment recovered in a court of a State "would operate directly upon **him** and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to **stay proceedings** in a State court." This extra **dictum** must be read and taken in the light of the facts of that case, which was a **removed** cause with its attendant writs; we submit that to extend its effect to the exigencies of this case, as contended by counsel for the appellee, would bring the **dictum** in open and direct conflict with the express holdings of this court in **Diggs** *vs.* **Wolcott,** 4 Cranch., 179; in **Peck** *vs.* **Jenness,** 7 How., 612-625; in **Haines** *vs.* **Carpenter,** 91 U. S., 254; in **Dial** *vs.* **Reynolds,** 96 U. S., 340; in **Stevens** *vs.* **Bank,** 169 U. S., 432; in **Riggs** *vs.* **Johnson County,** 6 Wall., 195; in **Ill. Cent. R. R.** *vs.* **Sheegog, Adm'r,** 217 U. S., 599, and in **Hull** *vs.* **Burr,** decided by this court at the October term, 1913.

To quote from the leading case of **Peck** *vs.* **Jenness,** 7 How., 625, where counsel sought to make the same distinction as is sought to be made in the brief of appellee by the quotation from **Marshall** *vs.* **Holmes,** this court, speaking through Mr. Justice Grier, said:

"The fact, therefore, that an injunction issues **only to parties** before the court, and not to the court, is **no evasion of the difficulties** that are the necessary result of an **attempt to exercise that power over a party who is a litigant in another and independent forum.**

"The act of Congress of the 2d of March, 1793, ch. 66, sec. 5, declares that a writ of injunction shall not be granted **'to stay proceedings in any court of a State.'** In the case of **Diggs** *vs.* **Wolcott,** 4 Cranch., 419, the decree of the circuit court had enjoined the **defendant** from proceeding in a suit pending in the State court, but this court reversed the decree because it had no jurisdiction to **enjoin proceedings** in a State **court.**"

The doctrine of this case has been followed and approved by this court from the date of this early decision to the present time.

The court will remember that the **only** injunction that was ever issued in **Marshall** *vs.* **Holmes, supra,** was the injunction **issued by the State court** upon the filing of Mrs. Marshall's petition in her action of nullity in that court, and which action she subsequently sought to remove to the U. S. Circuit Court.

Under the doctrine of **Watson** *vs.* **Bondurant,** 103 U. S., 281, 287, and **Lawrence** *vs.* **Railroad Co.,** 121 U. S., 634, 636, the case of **Marshall** *vs.* **Holmes** could not have been taken to the Federal court to obtain an injunction, as that would have been, in the language of this court, in those cases, **"an evasion of the statute."**

Counsel for appellee then proceeds to quote from (Appellee's Brief, p. 25) the case of **Earle** *vs.* **McVeigh,** 95 U. S., 503-507, which case, he says on page 26 of his brief, is "practically on all fours with the case at bar." A reference to the case of **Earle** *vs.* **McVeigh** will show that, **after** the issuance of an injunction **by the State court** to restrain the execution of the judgment at law that had been rendered in favor of the party who was defendant in the injunction suit, the **case was removed** to the United States Court for the Dis-

trict of Virginia, where the injunction granted by the State court **was maintained.** So that **Earle** *vs.* **McVeigh** was **not** an **original independent injunction bill,** filed in the Federal court, but was one of the many cases **removed** to the Federal court, along with all of the writs and proceedings that the State court had granted **before removal.** So that **Earle** *vs.* **McVeigh** is in line with **Watson** *vs.* **Bondurant, supra,** and the other removal cases.

Furthermore, it will be observed that in **all of the cases** removed from the State to the Federal courts, where the bill was filed in the State court **for a writ of injunction,** the injunction bill was invariably an **ancillary proceeding** to the proceeding at law, and was brought originally in the **same court** or in the **same jurisdiction** and under the **same sovereignty** where the action at law was pending. Of such cases the Federal court takes jurisdiction only by virtue of the **removal statute,** which allows the case to be removed **in toto** with **all of its processes and proceedings.**

Appellee's counsel then proceeds to quote the case of **National Surety Company of New York** *et al. vs.* **The State Bank,** 120 Fed., 523 (Brief, p. 26). The reasoning of this remarkable decision, as we have already pointed out in our original brief (p. 46), is contrary to the **settled jurisprudence** of this court. The theory of this decision is that the Federal court may act upon the **party defendant** in a suit in equity to restrain the **defendant** from proceeding on or executing his judgment at law recovered in a court of a State (Appellee's Brief, p. 29). This is in **direct conflict** with the authorities cited **supra.** This opinion proceeds upon an utter misapprehension of the facts in the case of **Marshall** *vs.* **Holmes, supra,** in **assuming that an injunction was originally issued in that case by the Federal court,** and **overlooks** the unbroken line of decisions of this court (see our Original Brief, p. 37), holding that an injunction of the **Federal court** directed against a **party** in a suit at law, in the **State court,** restraining **him** from enforcing or proceeding on his judgment, is a **staying of proceedings** in the State

court in **plain violation** of the terms of section 720, Rev. St. U. S., now section 265, Judicial Code.

The other cases cited by appellee, beginning with **Marine Insurance Co.** *vs.* **Hodgson,** 7 Cranch., 332, have no application to the point now under discussion (Brief, pp. 31-35). These cases only apply where an injunction is issued by the Federal courts to relieve against judgments at law **obtained in the Federal court,** or where a judgment of a State court is **sued on** or is **set up,** by way of defense, in a Federal court. The bills in those cases where an injunction was prayed for are necessarily of an **ancillary** nature, and must be filed in the same court of the United States wherein the judgment at law was rendered.

On page 34 of appellee's brief counsel seeks to point out that appellant conceded at the bar of the trial court that the injunctive relief sought by complainant herein could have been afforded in a proper suit brought in the State court. Counsel for appellant not only makes the same admission here, but contends that the fact that the **State court** had **full power** to give relief in equity by an **ancillary** proceeding is the **very reason why,** as pointed out by Mr. Justice Story, the Federal courts were **prohibited** from entertaining **original independent injunction bills** to stay proceedings in the State courts, and throughout the length of appellee's brief your honors will find **no case** decided by the Supreme Court of the United States cited as a precedent for any such mode of procedure.

We have already analyzed the cases of **Johnson** *vs.* **Waters,** 111 U. S., 640, and **Arrowsmith** *vs.* **Gleason,** 129 U. S., 86, in our original brief, page 32. No injunction was asked for or granted by the Federal court in either case to stay any proceedings in the State court.

Cole *vs.* **Cunningham,** 133 U. S., 107, was an action brought in the State court of the County of Suffolk, Massachusetts, to restrain the defendants, who were citizens of that State, from bringing suits **in the State of New York,** for the evident purpose of obtaining a **preference over other cred-**

itors of an insolvent citizen of the State of Massachusetts. It was held that the entertaining by the equity courts of a State of such a suit was no violation of the **full-faith-and-credit clause** of the Constitution of the United States, since such courts had the undoubted power to control persons within their jurisdiction in prosecuting suits in **another State.** No contention was made or involved in that case that a Federal court had power to issue an injunction to stay proceedings in a State court and section 720, R. S. U. S., was in no manner involved.

Appellee's sole reliance appears, after all, to be **Marshall** *vs.* **Holmes,** 141 U. S., 596, since he **requotes,** at pages 40, 41, 42, and 43 of his brief, substantially the **same matter** from that case that he had quoted on pages 22, 23, and 24 of the same brief. He follows up **Marshall** *vs.* **Holmes** with the case of **Terre Haute & Indianapolis R. R. Co.** *vs.* **Peoria & P. U. R. R. Co.,** 82 Fed., 943-946. This case is based upon **Marshall** *vs.* **Holmes,** and to show how far the learned judge (Circuit Judge Grosscup) misunderstood the case of **Marshall** *vs.* **Holmes** and its application, **as a precedent** or **as an authority** in the case before him, we quote (p. 946):

> "Such a case was **Marshall** *vs.* **Holmes,** 141 U. S., 589; 12 Sup. Ct., 62. That action was **begun originally in the Federal court,** upon the ground that such judgment had been obtained by the fraud of one of the parties in forging the plaintiff's signature to a paper, on the strength of which alone the judgment was obtained.
>
> "The injunction was issued in aid of the **main purpose of the suit,** restraining the **judgment creditor from issuing an execution upon such judgment, pending final decree.**"

The only injunction that was issued in **Marshall** *vs.* **Holmes** was issued by the **State court.** Judge Grosscup evidently then misunderstood the **fundamental facts** of **Marshall** *vs.* **Holmes,** and therefore **misconceived** the doctrine of that case and its bearing and value as a precedent. How-

ever, his remarks as to section 720 are, after all, purely **obiter dicta,** for the reason that the motion for an injunction in the case before him was **overruled.** (See 82 Fed. Rep., p. 947.)

Conclusion.

Appellee's counsel close their brief with an extraordinary discussion of the question of fraud (Appellee's Brief, p. 112). notwithstanding the master's report that the evidence in the case does not justify the charge and his findings not questioned by either court (Rec., pp. 170-1), they then attempt to **bolster** up their contentions by quotation of **ex parte** testimony, delivered more than **four years after the occurrence of the events testified to, and almost five years after the verdict** (Rec., pp. 177-179), to impeach the **quantum** of damages found by the verdict of the jury in the State court. This discussion must be intended as a **prayerful** suggestion to this high tribunal that it ought to **bend** a long line of venerable and well-established **precedents,** or even to **make a bad one** in this case, in order to relieve the Southern Railway Company, which is sought to be compelled to pay the damages which it admittedly inflicted and **which a jury found** and which an **upright State court judge approved,** after **seeing and hearing the appellant, his doctor, and the other witnesses to the facts.** (See State court minutes attached as an exhibit to the bill of complaint, Rec., pp. 16, 17.)

We make this statement solely for the reason that it is **not possible to suppose** that the learned counsel for appellee can be so unfamiliar with fundamental principles as to offer this matter as a **serious discussion** of the equitable doctrine for relief against fraud, or of the fundamentals which a case charging fraud must present, in order that a court of equity may afford relief from a verdict and judgment in a suit at law.

After their client, the Southern Railway Company, had studiously **disregarded** and **ignored the State law and the State courts** and sought to escape the legal consequences

of its **own acts** by invoking the protection of a Federal injunction, the **granting** of which involved the **violation of a prohibitory Federal statute,** counsel now make a last desperate attempt to **justify** the conduct of their client by making bold in their brief to have this court **ignore** and **disregard** the **Seventh Amendment to the Constitution of the United States,** which in plain terms provides that "**no fact tried by a jury shall be otherwise examined in any court of the United States than according to the principles of the common law.**"

Chicago, Burlington, &c., R. R. *vs.* Chicago, 166 U. S., 242.

Chgo. *et al.* Traction *vs.* Hof, 174 U. S., 13.

But appellee does not stop **even here.** Its counsel suggest that the **resort** by the appellant **to a trial by jury** to establish his damages in confirmation of the default, was a **further index of fraud!** (Appellee's Brief, p. 114.)

Not only does appellee point to, as still another **index** of fraud, the polite refusal by Simon's counsel to accept a nominal sum, in **full settlement** of Simon's damages, but they actually misstate the record and overstep the statements of complainant's own witnesses,—whose special function it was to minimize all claims for personal injuries when made against the Southern Railway Company,—in stating that Simon's counsel offered to accept $5,000 in full **settlement** before suit was brought. (**See testimony of Dr. Martin,** Rec., pp. 185, 186, 187; **Kennedy,** Rec., p. 208; **Shumate,** Rec., pp. 60, 212, 213.) It is very plain, from the undisputed facts of the record, that not only was counsel's pollicitation of $5,000, if the figure is correctly stated, which we deny, an **unaccepted offer** of compromise, but also that the parties then and there conducting the negotiations were so widely apart in their figures that further discussion was found to be and **was stated to be** utterly useless (Rec., p. 187). These tentative negotiations also, as shown by the record, occurred at a time when counsel for Simon did not have the data as to Simon's injuries, suffering, damages, expenses, or other losses, growing out of the railway

collision complained of (Rec., p. 8). The fraud allegations in the bill, indefinite as they are, were not only false and meretricious, no evidence having been tendered to support them, but the slightest inquiry in New Orleans as to who Ephraim Simon was, would have suggested to counsel that this man's character and record were too fair and clean to justify the charges of magnifying his claim for damages by false swearing and malingering in reference to his sufferings. The record shows without dispute, and without countervailing proof, that in civic, financial, and social circles in New Orleans, where he has dwelt for nearly half a century, Ephraim Simon is known to be a man of the highest moral character and business integrity and a citizen without reproach (Rec., pp. 37-49).

We submit that no case of fraud or other equitable ground of relief is made out on the **face of complainant's bill, and certainly as the master found there was no evidence offered in support of it,** and that the further the argument on behalf of the Southern Railway Company is advanced in this case the more clearly does it appear that its bill of complaint was known to be barren of equitable merit when drawn and directed to be filed, and that its whole case was a made up case without regard either to the LAW OF THE LAND or to the facts that were within easy reach.

It is therefore submitted that the decree of the Circuit Court of Appeals for the Fifth Circuit should be **reversed** and that this cause should be **remanded** to the trial court, with directions to dismiss the bill for want of equity. All of which is most respectfully submitted.

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No. 34

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OCTOBER TERM, 1914.

~~No. 1129.~~

EPHRAIM SIMON, Apellant,

versus

THE SOUTHERN RAILWAY COMPANY, Appellee.

Brief on Behalf of the Southern Railway Company, Defendant, Appellee.

J. BLANC MONROE,
MONTE M. LEMANN,
Solicitors for Appellee.

ALFRED P. THOM,
Of Counsel.

New Orleans, October, 1914.

E. P. ANDREE PTG. CO., BRIEF PRINTERS, 516 NATCHEZ ST.

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Supreme Court of the United States

OCTOBER TERM, 1914.

No. 1139.

EPHRAIM SIMON, Apellant,

versus

THE SOUTHERN RAILWAY COMPANY, Appellee.

Brief on Behalf of the Southern Railway Company, Defendant, Appellee.

SYLLABUS.

I. When diversity of citizenship exists and the amount involved exceeds three thousand dollars, a Federal Court can afford a litigant the same measure of protection which the State Court offers.

II. In aid of jurisdiction thus invoked, the Federal Court may issue conservatory process of injunction, just as a State Court may utilize that writ.
Terre Haute vs. Peoria, 82 Fed. 945.

III. When a default judgment, final and finished in the Court which rendered it, has been rendered in a State Court, which judgment is void for want of citation of defendant, or because obtained by fraud, or inequitably obtained because of some accident or mistake not attributable to his negligence, defendant was prevented from properly defending it, equiiy wiill by injunction restrain the plaintiiff personally from seeking to avail himself of his unfair advantage.

17 Howard 445, 94 U. S. 653; 104 U. S. 93; 107 U. S. 11; 133 U. S. 152; 98 U. S. 61; 141 U. S. 496; Marine Insurance Company vs. Hodgson, 17 Cranch 332; Johnson vs. Waters, 111 U. S. 667; Cole vs. Cunningham, 133 U. S. 112.

IV. In such case, if diverse citizenship exists and three thousand dollars are in controversy, the Federal Courts, as well as the State Courts, may issue the process.

Marshall vs. Holmes, 141 U. S. 496; Gaines vs. Fuentes, 82 U. S. 10; Arrowsmith vs. Gleason, 129 U. S. 98; Old Wayne Association vs. McDonough, 204 U. S. 15; National Surety Company vs. State Bank, 120 Fed. 593.

V. Nor is there anything in U. S. Revised Statutes 720, to prevent it, since the proceeding is an independent proceeding whether it be brought in the State or the Federal Court, and no State Court having assumed jurisdiction of it, the Federal Court interferes with no State Court in taking it up.

National Surety Company vs. State Bank, 120 Fed. 593; Julian vs. Central Trust Company, 193 U. S. 112; Marshall vs. Holmes, 141 U. S. 496; Gaines vs. Fuentes, 92 U. S. 10.

VI. It was conceded at the bar in the lower Court that this action as brought could have been brought in the State Court. This being so, and diverse citizenship existing, no valid reason can be given why it should not be brought in the Federal Court. (Judge Parlange's statement of Concession, Transcript p. 12).

VII. The fact that the State statute confines certain actions to certain specified State Courts will not prevent the proper Federal Courts from entertaining same, provided the other jurisdictional prerequisites exist, for a State statute cannot in any wise abridge or impair the scope of the jurisdiction of the Federal Courts.

Hydes vs. Stone, 20 Howard 170-175; Mississippi Mills vs. Cohn, 150 U. S. 202.

VIII. The judgment obtained by Simon in the State Court was based on a pretended citation served on the Assistant Secretary of State of Louisiana. That official pigeonholed the papers and the defendant had no knowledge of the proceedings until after judgment was rendered. (Transcript p. 14, p. 18, p. 65, p. 66, p. 197).

IX. Such a citation was no citation at all because the Act of Louisiana (Act 54 of 1904) under which it was suposed to have been made requires service on the Secretary of State, not on the Assistant Secretary, and such statutes are required to be rigidly construed.

Lonkey vs. Keyes Silver Mining Co., 17 L. R. A. 352; Watertown vs. Robinson, 69 Wis. 233; Amy vs. Watertown, 130 U. S. 302; Alexandria vs. Fairfax, 95 U. S. 780; Settlement vs. Sullivan, 97 U. S. 447; Gage vs. Trust

Company, 156 Fed., 1004; Swarts vs. Stock Company, 166 Fed. 343; King vs. Davis, 137 Fed. 206.

X. A State law authorizing service of process directed to foreign corporations in suits **in personam** on the Secretary of State and authorizing that official to pigeonhole same, the effect of which is that the foreign corporation receives no notice of same, does not constitute due process of law, and violates the Federal Constitution.

Wayne vs. McDonough, 204 U. S. 17; Gouner vs. Missouri Valley Bridge & Iron Co., 123 La. 964, 49 So. 657; Scott vs. McNeil, 154 U. S. 46; Lafayette Insurance Co. vs. French, 18 Howard 470; St. Clair vs. Cox, 106 U. S. 356; Lasere vs. Rocherau, 17 Wallace 437; Twining vs. N. J., 211 U. S. 110.

XI. An interstate railroad which owns no rails and operates no trains in the State will not be held to be doing business in such State because it has therein two agents, one exclusively employed in soliciting passenger business and one exclusively employed in soliciting freight business.

Green vs. Chicago, Burlington & Quincy Railway, 205 U. S., 530; Peterson vs. C. R. I. & P. Ry., 205 U. S. 390; Maxwell vs. Atchison Ry. 34 Fed. 286; Earle vs. C. & O. Ry. Co., 127 Fed. 235; Union Associated Press vs. Times-Star Company, 84 Fed. 419; Fairbanks vs. C. N. O. & T. P. R. R., 54 Fed. 421; Wall vs. Railroad, 95 Fed., 399; Maguire vs. Great Northern Railroad Company, 155 Fed. 231; West vs. C. N. O. & T. P. R. R., 170 Fed. 355; Miller vs. Pennsylvania R. R. Co, 113 Fed. 506.

XII. The fact that an interstate initial carrier furnishes and causes to be sold through interstate tickets to points on the lines of its connecting carriers, does not make those connecting carriers, whose lines are without the initial State, amenable to process within that State on the ground that they are doing business therein.

Maxwell vs. Atchison Railroad, 34 Fed. 286; Earle vs. C. & O. 127 Fed. 235; Green vs. C. B. & Q. Railroad Co., 205 U. S. 530; Daly vs. Railroad Co., 8 Abbott (Pr. New York) 427; St. Louis Insurance Co. vs. Railroad Co., 104 U. S. 146; Allen vs. Yellowstone Park Transportation Co., 154 Fed. 507; Goepfert vs. Compagnie Generale Transatlantique, 156 Fed. 198.

XIII. Mere ownership of stock in a corporation which is doing business in a State does not constitute a doing of business in that State by the owner so as to subject him to process there.

Peterson vs. C. R. I. & P. Railroad Co., 205 U. S., 390; Earle vs. C. & O. Railroad, 127 Fed., 235; Standard Oil Company, 101 Pa. State, 119.

XIV. The single act of leasing the right to use in the future real property located in a State, unaccompanied by user of any kind, does not constitute doing business in a State so as to subject the lessee to process in the said State.

Cooper vs. Ferguson, 113 U. S., 727; Hunter vs. Mutual Reserve Life Ins. Co. 218 U. S. 573; Empire Milling Co. vs Tombstone Mill & Mining Co., 100 Fed. 910; Bruner vs. Kansas Moline Plow Co., 168 Fed 220; Metal Co. vs. Mining Co., 152 Fed., 1008; Gilchrist vs. Helene Railroad Co., 47 Fed. 598.

XV. When a corporation of one State goes into another State and transacts business in defiance of its statute as to service of process, it will, in an action against it in such State, be held to have assented to the terms validly prescribed by the local statute for service of process in respect to business done in that State, but its assent in that regard will not be inpiled only as to business transacted in that State.

Old Wayne vs. McDonough, 204 U. S., 8; 68 Nebr. 920; 49 Fed. 910; Central Railway vs. Carr, 76 Ala., 388; Robbins vs. Oceanic, 112 N. Y. 315; Osler vs. Buffalo, 130 Fed. 1017; Newell vs. Great Western Railroad Co., 19 Mich. 336.

XVI. A judgment rendered without citation is not, as between the parties **res adjudicata** on the question of citation **vel non.**

Old Wayne vs. McDonough, 204 U. S. 15; Cole vs. Cunningham, 133 U. S. 112; Scott vs. McNeal, 154 U. S. 45; Michigan Trust Co. vs. Terry, 175 Fed. 669.

XVII. The conduct of the defendant herein in obtaining the judgment which Simon obtained in the State Court, amounted to a fraud upon the Southern Railroad Company.

May It Please the Court:

The contentions made by Ephraim Simon, appellant in this case, have already been passed upon adversely by the Special Master, by three different U. S. District Judges, namely, Judges Parlange, Saunders and Foster, and by the three Judges of the Circuit Court of Appeals for the Fifth Circuit, namely Judges Pardee, Shelby and Maxey. His contention on the subject of jurisdiction has even been decided against him by this Court (208 U. S., 4). Notwithstanding all this, he is here. The facts are as follows:

PRELIMINARY.

After reading appellant's fourth assignment to the Circuit Court of Appeals at record p. 301 and pages 22 and 23 of appellant's brief, we are at a loss to discover what right he has to an appeal to this Court. If the statements there made by him be correct, and if it be a fact that complainant relies only upon fraud, accident and mistake and the fact that it was not doing business in Louisiana, and raises no constitutional questions in its bill, then the jurisdiction of the Circuit Court must have been invoked on grounds of diverse citizenship solely. If, however, that is the case, then the judgment of the Circuit Court of Appeals is final and the present appeal must be dismissed.

181 U. S. 277, American Sugar Refining Co. vs. New Orleans;

187 U. S. 585, Ayers vs. Polsdorfer.

I.

FACTS.

The appellant, Ephraim Simon,—a citizen of Louisiana (Tr., p. 8), had his ankle slightly strained while traveling on a train of the Southern Railway Company. The accident occurred at York, in the State of Alabama (Tr., p. 9). The Southern Railway Company is a Virginia corporation, as Simon himself admits (Tr., p. 9).

After the accident, the railway surgeon examined Simon and pronounced his injuries inconsiderable. By way of compromise, Simon was offered $350.00. He originally claimed but $5000.00, spoke of accepting $750.00, and as the railroad company would not offer that much, Simon withdrew, as the railroad thought, to think the matter over and report back to the railroad.

Instead of so doing, he surreptitiously went into the State Court in New Orleans, made a so-called service of a petition on the Southern Railway Co. through the **Assistant** Secretary of State of Louisiana, inflated his demand up to $13,348.00, impaneled a jury, and unbeknown to the railroad company obtained a default judgment against it for $13,348.00.

In the New Orleans Court in which this judgment was obtained, it is an universal custom to have the testimony transcribed stenographically, and, under the law, an appeal may be had **ON THE FACTS** as well as the law to the Supreme Court of the State. In the present instance, this invariable custom, at Simon's suggestioin, was disregarded. The testimony was **not** taken stenographic-

ally. In this way, the railroad company was deliberately deprived of any possible opportunity of obtaining any effective review of the judgment. One naturally inquires why was this precaution taken?

The alleged citation made on the Assistant Secretary of State was pigeon-holed by that official in his office, under general instructions to that effect from the Attorney-General of Louisiana (T., p. 18). No attempt was made to notify the Southern Railway Co. of its receipt. The Southern Railway Company had absolutely no knowledge of the suit either actual or constructive until after the judgment was rendered. Promptly on being advised of the suit, that company employed counsel and sued out the injunction now before your Honors, restraining **Ephraim Simon** from executing the judgment so peculiarly obtained.

Judge Charles Parlange, then U. S. District Judge for the Eastern District of Louisiana, caused a rule nisi to issue, and, after a hearing on the same, granted a preliminary injunction (Tr., pp. 85, 86 and 87).

Simon then filed, successively, a demurrer and a plea to the jurisdiction (Tr., pp. 93 and 97), and both having been overruled, he filed answer (Tr., p. 99).

THEREAFTER SIMON DELIBERATELY AND IN COLD BLOOD VIOLATED THE INJUNCTION BY CAUSING EXECUTION TO ISSUE ON HIS JUDGMENT.

The facts in connection with this defiance of the mandate of the U. S. District Court are fully set forth in complainant's rule for contempt (Tr., p. 109).

By that rule, complainant cited Simon to show cause why he should not be committed for contempt. The rule was heard (Tr., p. 108), and Judge E. D. Saunders (who meantime had succeeded Judge Parlange) fined Simon for contempt, and ordered that:

> "He stand committed to be imprisoned in the Parish Prison until his fine is paid" (Tr., p. 130).

Simon refused to pay the fine, went to prison, and applied to this Court for a writ of **habaes corpus.** This court issued the preliminary writ of **habeas corpus,** took the record up (Tr., p. 141), and, having examined it, denied Simon the relief asked for and thereby affirmed the commitment for contempt. See **Ex Parte Simon, 208 U. S., 144.**

Thereafter, the cause was heard on its merits before the Honorable Charles F. Buck, whom Judge Parlange had appointed Special Master in the matter by an order reading as follows:

> "The Court hereby appoints the Honorable Charles F. Buck to be special master in chancery in this case, with all powers possessed by masters in chancery. This cause is now referred to him and he is specially authorized and directed to hear and take all testimony and evidence in this cause and to report the same to this Court, together with his findings of law and fact, and of any and all matters which may come before him in this cause.
>
> "(Signed) **Chas. Parlange, U. S. Judge.**
>
> "New Orleans, La., June 10th, 1905."

What happened before the Special Master is thus stated by that official (Tr., pp. 154-155):

> "The case was fixed for hearing by consent for Thursday, July 10th, 1908, before the Master.
>
> "**Harry H. Hall, Esq.**, for Complainant.
>
> "**Henry L. Lazurus**, for Defendant.
>
> "Dr. Denegre Martin and Harry H. Hall, Esq., testified on behalf of complainant.
>
> "Solicitors for complainant offered certain documentary evidence duly identified, and further hearing was adjourned, subject to notification of the Master or agreement of the parties, all as per exhibit marked:
>
> " 'Testimony taken before the Master on behalf of the complainant, filed Saturday, April 16th, 1909, returned with this report.
>
> "(Signed) **Charles F. Buck**, Special Master.
>
> "The hearing was resumed January 7th, 1909, the testimony of Larz. A. Jones was taken on behalf of defendant. Both parties were present by their solicitors. The documentary evidence offered was duly identified and filed, as per Exhibit marked: 'Testimony for Defendant, filed April 16th, 1909.' "

After the hearing thus had the **SPECIAL MASTER FILED HIS REPORT** (Tr., p. 148 to 176), in which, after going over the entire ground, he found that the judgment obtained by **Simon** in the State Court **WAS HAD WITHOUT CITATION** of the defendant, and as such, was an absolute nullity.

To this report, defendant, Simon, took many exceptions. Among others was an exception to the order ap-

pointing the Master. So far as this record shows this exception was the first objection of any kind made by Simon to the appointment of the Master, or to the powers vested in that official. On the contrary, on page 277 of the transcript Simon through his counsel entered into an agreement relative to the exceptions to be filed to the Master's report. Simon, therefore, has placed himself in the unenviable light of one who takes advantage of the appointment of a Master, offers his evidence and argument before him, all with the full knowledge of the order appointing the Master, and only when the Master decides against his contentions, does he discover any informality in the appointment.

Under such circumstances, Simon is surely estopped to contest in any manner, the validity of the order of reference quoted **supra**. Of this, more **anon**, although it may be said to be a moot question, since all that Simon claimed in the Court below was that the Master should have reported the proceedings had before him to the Judge, who should consider them fully himself, and since the Judge **a quo**, Judge Foster, did so fully consider them, as appears by his ruling (Tr., p. 295), which reads as follows:

> "The defendant has excepted to the Master's report as a whole, and specially both as to his conclusions of law and findings of fact.
>
> "It is contended by complainant that defendant by not having objected to the taking of the evidence before the Master, has consented to his appointment, and is now estopped to controvert his findings of fact.

"I do not agree with this contention. The Court could not, except by consent of all parties, abdicate its duty to determine, by its own judgment, the facts and the law applicable to them. The report of the Master is merely advisory to the Court, and while entitled to great weight on findings of fact deduced from conflicting testimony, where the Master has had opportunity to form his own opinion as to the truthfulness of the witnesses, the Court may weigh the evidence and find its own facts, and, indeed, it is the Court's duty to do so whenever either side excepts to the report of the Master. **In this case, I consider the entire matter is before me for decision.**"

Under this ruling, the defendant received at the hands of the Court below, precisely the treatment which he claimed that he was entitled to receive, and which he would have received had the Master not reported, but simply transmitted the documents and evidence to the Court. Therefore, as we remarked above, the question of the validity of the order appointing and empowering the Master is one of academic interest merely. In this connection it may not be amiss to point out the inconsistency of which appellant is guilty when, after assailing the appointment of the Master at record p. 278 and brief p. 7, he volt faces at brief p. 72 and relies upon certain findings of the Master.

Thereafter, the Judge **a quo**, Judge Foster, who had, meantime, succeeded the original Judge (Parlange), and the intermediate Judge (Saunders), when the matter was heard before him on the merits, handed down a written opinion. In it he sustained the complainant's

contention that there was no citation of the defendant railway company in Simon's original suit and held (Tr., p. 297):

> "That the judgment of the Civil District Court was rendered without due process of law, and is, therefore, null and void."

He further held, that since the judgment was null and void, it was useless for him to pass upon the other questions in the record (Tr., p. 297), and he made the injunction perpetual (Tr., p. 298). From this judgment Simon prosecuted an appeal to the Circuit Court of Appeals, Fifth Circuit, where the case was fully argued before Judges Pardee, Shelby and Maxey (T., p. 309), and again decided against Simon, as appears by their opinion at page 309, and decree (T., p. 313), affirming the judgment of the District Court. A rehearing having been refused, Simon appealed to this Court, assigning some eighteen errors. It is this appeal which is presently at bar. We shall discuss these assignments seriatim.

II.

ASSIGNMENT NO. 1.

The Circuit Court of Appeals say, in their opinion (T., p. 310):

> "That the Circuit Court had jurisdiction of the suit has been authoritatively decided in **Ex Parte Simon, 208 U. S. 144**; see also **Gaines vs.**

> **Fuentes, 92 U. S. 10; Marshall vs. Holmes, 141 U. S. 589,** and authorities therein cited. That decision is binding upon this Court until reversed or modified by the Supreme Court."

This finding is the subject of Simon's first assignment, he contending that the Circuit Court of Appeals erred in holding that this Court authoritatively decided in **Ex Parte Simon, 208 U. S. 144,** that the Circuit Court had jurisdiction of this case.

Reference to the opinion in **Ex Parte Simon** shows that this court, speaking through Mr. Justice Holmes, said:

> "The Circuit Court had jurisdiction of the cause. That must be assumed at this stage, and finally, unless we overrule the strong intimations in **Marshall vs. Holmes, 141 U. S. 589,** and the earlier cases cited in that case. Even if the decision could have been put upon a narrower ground, the ground adopted was that the Circuit Court had original jurisdiction of such a suit."

This language seems to dispose of Assignment No. 1, especially when we consider the circumstances under which it was used. They were that Simon, after being enjoined by the District Court in this proceeding, violated the injunction and was incarcerated for contempt. He appealed to this Court for relief by habeas corpus, on the ground that the District Court was without jurisdiction to enjoin him; hence, without jurisdiction to jail him. The jurisdictional issue was **the vital one in that proceeding,** the crux upon which the whole proceeding hung. In deciding that issue this Court used the lan-

guage above quoted and refused to liberate Simon. It thereby necessarily affirmed the jurisdiction of the Circuit Court to try the cause. That it was correct in so holding the discussion of the next assignments will demonstrate.

ASSIGNMENTS II, III, IV, V, VII, X, XI, XII, XIV, XV, XVI.

All of these assignments either directly or indirectly seek to raise the point that the Circuit Court had no jurisdiction to entertain the bill. As stated above, we believe that this Court has already decided this point against Simon.

Before considering further the legal aspect of this question, let us get clearly before us the history of the many occasions in which the point has been decided against Simon already in these proceedings.

The facts are that the Southern Railway Company, a Virginia Corporation, invoked the jurisdiction of the United States Circuit Court, **praying that tribunal to enjoin Simon**, a citizen of Louisiana, from executing a judgment obtained by him against it. The reasons alleged why Simon should be enjoined from executing his judgment are:

1: Because it was obtained without citation on the defendant.

2: Because it was obtained fraudulently.

Simon questioned the jurisdiction of the Circuit Court. This Court being called upon to review a ruling of the Circuit Court affirming that jurisdiction, said:

Ex Parte. Simon, 208 U. S. 148:

> "The Circuit Court has jurisdiction of the case. That must be assumed at this stage **and finally**, unless we overrule the strong intimation in **Marshall vs. Holmes, 141 U. S. 589**, and the earlier cases cited in that case. Even if the decision could have been put upon narrower ground, the ground adopted was that the Circuit Court had original jurisdiction of such a suit."

Dealing with the case at bar, and deciding this particular point, U. S. District Judge Parlange said (Tr., p. 85):

> "The main contention on behalf of the defendant is that this Court is precluded from issuing an injunction in this case, because of the prohibition of Section 720 of the Revised Statutes, etc
>
> "It is thoroughly settled that the Statute just mentioned has no aplication to such a cause as the instant one. See **Massie et al vs. Buck, 128 Fed. Rep. 27**, settling the question in this Circuit. See authorities cited in that case. See **National Surety Co. etc. vs. State Bank, etc. (C. C. A. 8th Circuit), 120 Fed. Rep. 593; Terre Haute, etc., Co. vs. Peoria, etc., Co. 82 Fed. 943; Garner vs. Second Natl. Bank, etc. (C. C. A. 1st Circuit), 67 Fed Rep. 833. Circuit Judge, McCormick, in Central Trust Co. vs. St. Louis, etc., Co., 59 Fed. 386; Julian vs. Central Trust Co., 193 U. S. 112**, and other cases.

"Section 720, Revised Statutes, applies only to cases where the jurisdiction of the State Court has attached first. Justice Field, in **Sharon vs. Terry, 36 Fed. Rep. 365**; Justice McKenna in **President, etc., Co. vs. Merritt, et al., 59 Fed. Rep. 7; Laning vs. Osborne, 79 Fed. Rep. 662**, and other cases. Notice, **Whitney vs. Wilder (C. C. A. 5th, Circuit), 54 Fed. Rep. 554.**

"In the Federal Courts, a trial Judge, in such a cause as the instant one, has the right in the exercise of a sound discretion to issue a preliminary injunction in order to preserve the status quo until the final termination of the cause. Circuit Judge Shelby in **Massie vs. Buck, supra; Railroad Commission, etc. vs. Rosenbaum, etc., vs. Harriman, 134 Fed. Rep. 331; Kerr vs. N. O., 126 Fed. Rep. 924.**

"The meaning of Section 720, Revised Statutes is perfectly plain. The Statute was intended only to prohibit the Federal Courts from attempting to act as Courts of Review over the State Courts. But Congress never intended that the Federal Courts in matters over which they have jurisdiction, should be deprived of any power of injunction necessary for the assertion and maintenance of that jurisdiction. The Federal Courts would be infirm and impotent indeed if when cases are brought to them which they are competent to decide they could not afford the ancillary protection without which the relief sought in the causes could not be given. In such cases the Federal Courts certainly have the same power that the State Courts would have if the causes were brought to them.

"IT WAS CONCEDED IN THE ARGUMENT, AND THE MATTER IS OBVIOUS WITH-

OUT THE CONCESSION, THAT THE COMPLAINANT IN THIS CAUSE COULD HAVE BROUGHT THIS ACTION IN THE STATE COURTS, COUPLING THEREWITH A PRAYER FOR AN INJUNCTION. This being unquestionably true, why cannot the complainant, being a citizen of another State, apply to this Court and obtain from it the same remedies which the State Court would grant it?

"The present action was brought first to this Court. That action is not now pending in the State Court and has never been in that Court.

"The matter is so clear that further discussion of it would be futile."

(Notice that the case of **National Surety Co., etc. vs. State Bank, etc. [C. C. A. 8th Circuit], 120 Fed. Rep. 593**—cited **supra**—is very similar to the instant case.)

U. S. District Judge Saunders was then called on to pass upon the question, which he did by upholding the jurisdiction of his Court to grant the injunction and committing Simon for contempt.

U. S. District Judge Foster then had the case before him, and decided it as follows (Tr., p. 284):

"In this case the complainant, the Southern Railway Company, seeks an injunction to restrain the defendant, Ephraim Simon, from executing a certain judgment of the Civil District Court for the Parish of Orleans, on the ground that the said judgment is null and void for want of citation. A demurrer attacking the jurisdiction of this Court to issue the injunction was overruled by my predecessor, the Hon. Charles Parlange,

> and the jurisdiction of this Court was also maintained by my predecessor, the Hon. Eugene D. Saunders. (See also, **Ex parte Simon, 208 U. S. 144.**)
>
> "From a careful consideration of the law as I understand it, I agree with them and cannot add to the reasons they assign."

The Circuit Court of Appeals, Fifth Circuit, then had the case before it and decided (Tr., p. 310) that this Court had held that the Circuit Court had jurisdiction.

Judge Shelby of the Circuit Court of Appeals, Fifth Circuit, had had a similar jurisdictional point before him in **128 Fed. Rep. 27, Massie vs. Buck,** and decided it in the same way.

Judge McCormick of the Circuit Court of Appeals, Fifth Circuit, long before had reached the same conclusion in a somewhat similar case. **55 Federal, 386.**

Mr. Justice McKenna had a similar point before him in **59 F., 7,** and decided it in the same way.

When a particular point in a certain case has been passed upon by the Supreme Court of the United States, by the Circuit Court of Appeals and by three different United States District Judges and when similar points in other cases have been passed upon by the Judges of the United States Circuit Court of Appeals of the same Circuit, **and all have reached the same conclusion,** it might fairly be presumed that that particular issue was settled, but as appellant is again arguing it here, we shall again marshall these veteran authorities which have so often prevailed.

II a.

"THE UNITED STATES CIRCUIT COURT HAS JURISDICTION OF A SUIT BETWEEN CITIZENS OF DIFFERENT STATES, CLAIMING THAT THE JUDGMENT OBTAINED BY ONE AGAINST THE OTHER IN A STATE COURT IS NULL FOR WANT OF CITATION."

That is, it may determine, as between the Southern Railway Company, and Simon, whether the judgment of the State Court was, or was not absolutely void for want of citation in that Court. The issue presented is not whether complainant has the right to control or direct proceedings presently being carried on in a State Court properly seized of jurisdiction, and to arrogate to itself the power to determine those living, moving issues. But the issue raised is whether the Federal Court, vested with jurisdiction by reason of diverse citizenship, has the power to sit in judgment upon the terminated act of the State Court and decide whether or not that action is null and void in so far as it concerns the parties thereto.

In the present case, as the parties are citizens of different States any controversy whatever that may arise between them involving over $3000 is subject to the jurisdiction of a proper Federal Court if the parties invoke that jurisdiction.

The Southern Railway Company seeks to enjoin Simon from in any manner interfering with its property. Simon comes in and asserts the existence of a right in him, under an alleged judgment of the State Court, to seize and sell complainant's property.

The Southern Railway Company sets up that the judgment relied on by Simon was rendered without citation of the defendant, and that therefore Simon should be enjoined from executing it.

The authorities sustaining the Federal Court's jurisdiction are so numerous and uniform that the question should not be considered open to discussion.

In Marshall vs .Holmes, 141 U. S., 596, the Supreme Court says:

> "While, as a general rule, a defense cannot be set up in equity which has been fully and fairly tried at law, and although, in view of the large powers now exercised by Courts of Law over their judgments, a Court of the United States, sitting in equity, will not assume to control such judgment for the purpose simply of giving a new trial, it is a settled doctrine that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a Court of Law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justiify an application to a Court of Chancery, **(Citing 7 Cranch 332, 336; 17 Howard 443, 445; 94 U. S. 652, 653; 104 U. S. 93, 96; 107 U. S. 3, 11; 133 U. S. 152, 154; 98 U. S. 61, 65).**
>
> "But it is contended that it was not competent for the Circuit Court of the United States, by any form of decree, to deprive Mayer of the benefit of the judgment at law, and that Mrs. Marshall could obtain the relief asked, only in the Court in which the judgments at law were rendered. Is it

true that a Circuit Court of the United States, in the exercise of its equity powers, and where diverse citizenship gives jurisdiction over the parties, may not, in any case, deprive a party of the benefit of a judgmennt fraudulently obtained by him in a State Court, the circumstances being such as will authorize relief by the Federal Court, if the judgment has been rendered by it and not by a State Court? * * *

"This Court held that the jurisdiction of the Circuit Court depended upon the question whether the action to annul the judgment was or was not in its nature a separate suit, or only a supplementary proceeding so connected with the original suit as to form an incident to it, and to be substantially a continuation of it. *****

"It is said: 'If the proceeding is merely tantamount to the common law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review or an appeal, it would belong to the latter category, and the United States Courts could not properly entertain jurisdiction of the case. Otherwise, the Circuit Courts of the United States would become invested with power to control the proceedings of the State Courts, or would have appellate jurisdiction over them in a case where the parties are citizens of different States. Such a result would be totally impossible. On the other hand, if the proceedings are tantamount to a bill of equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding, and, according to the doctrine laid down in Gaines vs. Fuentes, 92 U. S. 10, the case might be within the jurisdiction of the Federal Courts, The distinction between the two

classes of cases might be somewhat nice, but it may be affirmed to exist. *****

"Referring to the provisions of the Louisiana Code of Practice, authorizing an action to annul a judgment obtained through fraud, forgery, the forgoing of documents, etc., the Court said that it was not disposed to allow the fact that by the local law, an action of nullity, could only be brought in the Court rendering the judgment, or in the Court to which the judgment was taken by appeal, to operate so far as to make it an invariable criterion of the want of jurisdiction in the Courts of the United States.

" 'If,' the Court said: 'The State Legislatures could, by investing certain Courts with exclusive jurisdiction over certain subjects, deprive the Federal Courts of all jurisdiction, they might seriously interfere with the right of a citizen to resort to those Courts.'****

"These authorities would seem to place beyond question the jurisdiction of the Circuit Court to take cognizance of the present suit, which is, none the less, an original, independent suit, because it relates to judgments obtained in the Courts of another jurisdiction. While it cannot require the State Court itself to set aside or vacate the judgment in question, it may, **as between the parties before it**, if the facts justify such relief, adjudge that Mayer shall not enjoy the inequitable advantages obtained, by his judgments. **A DECREE TO THAT EFFECT WOULD OPERATE DIRECTLY UPON HIM, AND WOULD NOT CONTRAVENE THAT PROVISION OF THE STATUTE PROHIBITING A COURT OF THE UNITED STATES FROM GRANTING A**

WRIT OF INJUNCTION TO STAY PROCEEDINGS IN A STATE COURT. 'It would simply take from him the benefit of judgments obtained by fraud.'" (P. 596.)

91 U. S., 507, Earle vs. McVeigh:

In this case certain persons had obtained in the State Court judgments against McVeigh predicated upon service of process by posting on his former residence. They sought under them to seize and sell certain of his real estate. The United States Circuit Court made perpetual an injunction prohibiting the sale on the ground that the judgments were rendered without citation. The Court said:

> "Argument to show that no person can be bound by a judgment or any proceeding conducive thereto to which he was never a party or privy is quite unnecessary as no person can be considered in default with respect to that which it never was incumbent upon him to fulfill. Standard authorities lay down the rule that in order to give any binding effect to a judgment it is essential that the Court should have jurisdiction of the person and the subject matter, and it is equally clear that the want of jurisdiction is a matter that may always be set up against a judgment when sought to be inforced or where any benefit is claimed under it as the want of jurisdiction makes it utterly void and unanswerable for any purpose.

Since, in this case the Southern Railway Co. is seeking to enjoin Simon from seizing its property under a judgment rendered without citation, it can readily be

seen that the **EARLE McVEIGH CASE IS PRACTICALLY ON ALL FOURS WITH THE CASE AT BAR.**

In **National Surety Company of New York, et als., vs. State Bank, etc., 120 Federal Reporter, 593, et seq.,** the Court held (decided in 1903 Circuit Court of Appeals, Eighth Circuit)::

> "The gravamen of this bill, however, is not that there was no service of the summons in the action at law. It is that, in that action, a judgment which ought not, in equity and good conscience, to be paid, has been rendered against the surety company, when it had a perfect right of action, of which it was prevented from availing itself, by accident or mistake, without fault or negligence on its part. It is conceded that the judgment was regularly and legally rendered after due service of the summons. Yet the fact remains that it is a judgment without cause, which the appellants ought not to be required to pay, and which they were prevented from defending themselves against **by the failure of John F. Cornell, the auditor of public accounts of the State of Nebraska, to send them the summons, as the Statute directed.**" (Page 596.)
>
> "We have, then, an unconscionable judgment at law for seven thousand eight hundred and forty-two dollars and forty cents ($7,842.40) in favor of a citizen of Nebraska, to which the appellants, citizens of New York and Missouri, respectively, had a good defense, which they were prevented, by unavoidable accident, unmixed with fault or negligence on their part, from availing themselves of. The appellees are about to enforce this judgment. Has the Federal Court, sitting in equity, the juris-

diction to prevent them from so doing? Fraud, accident and mistake are three great heads of equity jurisprudence; and, whenever injustice or wrong, irremediable at law, is about to result from either, power is vested in, and the duty is imposed upon, the Courts of equity to prevent the threatened injury. Their jurisdiction rests upon the fact, that unless they act, wrong will be perpetrated which cannot be remedied; and the bills exhibited to them are appeals to the consciences of the chancellors to prevent injustice. Counsel for the appellees concede that the Federal Courts have equitable jurisdiction to enjoin the enforcement of unconscionable judgments at law which have been procured by fraud; but they insist that they are without power to restrain the collection of those which are secured by accident or mistake. But the foundation of equity jurisdiction is the wrong that will be perpetrated if the Court of equity does not act. Accident and mistakes are as well established grounds for the action of a Court of equity as fraud. It is as unjust—as abhorrent to the conscience of the chancellor—that one who does not owe a judgment which has been secured against him by accident should be compelled to pay it, as it is that he should be compelled to pay one procured by fraud. The injury is the same in each case. Both cases fall under equally well recognized heads of equity jurisdiction. Both appeal with equal force to the conscience of the chancellor, and the conclusion is irresistible that each is entitled to command the same measure of equitable relief. The Federal Courts, sitting in equity, have the same power to prevent the enforcement of unjust judgments at law, procured by accident or mistake,

that they have to prevent the collection of those obtained by fraud. They have plenary jurisdiction restraining the enforcement of judgments and decrees to which the defendants have meritorious defenses, that they were prevented from interposing, either by fraud or accident or mistake, unmixed with their own negligence." (Page 598.)

"This brief review of the cases cited by appellees will suffice to show that their careful reading will demonstrate—that they contain no decision that the Federal Circuit Court may not lawfully enjoin the enforceemnt of an unconscionable judgment or decree of a State Court based upon an unfounded claim, which the defendant was prevented, by unavoidable accident from defeating. More than this; they evidence this undubitable principle, which has now become so firmly established by repeated decisions of the Supreme Court, that it is no longer debatable: 'A Federal, Circuit Court sitting in equity, has jurisdiction to enjoin the enforcement of an unconscionable judgment of a State or of a National Court for new causes, such as fraud, accident or mistake, which prevented the judgment defendants from availing themselves of a meritorious defense that was not fairly presented to the Court which rendered the judgment. But it has no power to take such action on account of errors or irregularities in the proceedings on which the judgment or decree is founded, or on account of erroneous or illegal decisions by the Courts which rendered the judgments or decree. The reason of this rule is that cases of the former class present new controversies, which have never been raised in other Courts, of which the Federal Courts cannot escape jurisdiction if they arise

between citizens of different States, and involve the requisite amount." (Page 600.)

"The Constitution of the United States and the Acts of Congress have conferred upon the Federal Circuit Courts, the jurisdiction to hear and determine controversies between citizens of different States in which the matter in dispute exceeds $2,000 in value. This suit presents such a controversy. It is a new controversy, which has never been presented to, or decided by, the State Court which rendered the judgment, the enforcement of which the complainants seek to prevent. It involves the question whether or not the appellants were prevented, by unavoidable accident, from availing themselves of a good defense to the claim on which that judgment was based, and, if so, whether or not, the judgment plaintiff should be permitted to collect the judgment. The Circuit Court of the United States has jurisdiction of this controversy, and the appellants have the legal rights to a hearing and decision of the questions which it presents, and to the relief which the decision of those questions entitles them. That Court may not lawfully renounce that jurisdiction. It cannot rightfully deny to the appellants the right to the decisions, decree and writ to which they show themselves entitled. **It is not the judgment of the State Court against which these appellants leveled the injunction they seek. It is against the plaintiff in that judgment.** It is against the unconscionable use by that plaintiff of the judgment which he has recovered to perpetrate an unconscionable wrong. The basis of the suit is the threatened use of this judgment to extort from the appellants money which they ought not to be required to pay, and the Federal

Circuit Court is vested with the same power and charged with the same duty to enjoin the appellees from perpetrating this extortion by means of an unconscionable judgment of a State Court that it is to prevent them from effecting it by use of such a judgment of a National Court, by means of a fraudulent patent, deed, mortgage or by the use of any other instrument or device against which they have no remedy at law. The extortion of $7,842, from the appellants by the use of this judgment of the State Court will inflict upon them as grevious an injury as would its extortion by a like judgment of a National Court, and the Circuit Court of the United States has the same preventive power, and the appellants are entitled to the same measure of relief from it, in the one case as in the other. **The decisions of the Supreme Court which have been cited, however, have so conclusively disposed of this question that more extended discussion would be unprofitable; and we leave it with this brief statement of the reasons which have** induced, and which amply sustain, the rule that the Circuit Courts of the United States have the same jurisdiction and power to enjoin a judgment, plaintiff from enforcing an unconscionable judgment of a State Court, which has been procured by fraud, accident or mistake, that they have to restrain him from collecting a like judgment of a Federal Court." (Page 602.)

High on Injunctions, 4th Ed. Paragraph 209:

"Where a foreign corporation was required as a condition to doing business in the State to designate a State officer as an attorney to receive service of process, the failure of such officer to

notify the corporation as required by law of the service of the summons in a pending action is sufficient ground for enjoining a judgment subsequently rendered by default. In such case the negligence of the State official in failing to notify the corporation is not attributable to the latter since it has no choice in the matter as to his selection.

In **Marine Insurance Company of Alexandria vs. Hodgson, 7 Cranch, 332,** the Court said:

> "Without attempting to draw any precise line to which Courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any facts which clearly proves it to be against conscience to execute a judgement, and of which the injured party could not have availed himself in a Court of law, or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any fraud or negligence in himself or his agents, will justify an application to a Court of Chancery."

In **Williamson vs. Berry, 8 Howard 543,** the Court held:

> "The operation of every judgment depends upon the jurisdiction of the Court to render it. Though there may be jurisdiction for certain purposes in a cause, that jurisdiction may be exceeded in the judgment. And, whenever the right to property is claimed to have been changed under a judgment or decree by a Court, and it is set up as a defense in another Court, the jurisdiction

> what value would that right be if the Court in which the suit is instituted could not proceed to judgment and afford a suitable measure of redress; The right would be worth nothing to the party entitled to its enjoyment, as it could not produce any beneficial results. But this objection to the jurisdiction of the Federal tribunals has been heretofore presented to this Court, and overruled. **We have repeatedly held: that the jurisdiction of the Courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States, which prescribe the modes of redress in their Courts,** or which regulate the distribution of their judicial power.' If legal remedies are sometimes modified to suit the changes in the laws of the States, and the practice of their Courts, it is not so with equitable. The equity jurisdiction conferred upon the Federal Court is the same that the High Court of Chancery in England possesses — is subject to neither intimidation nor restraint by State Legislation, and is uniform throughout the different States of the Union." (Page 430.)

United States District Judge Parlange pointed out in his opinion, **supra,** at p. 18 **(see Rec., p. 86)** that Simon's counsel had conceded at the bar that the injunctive relief sought by complainant herein could have been obtained by it by a suit brought in the State Court. Such a suit would have been a new suit for that purpose. And Judge Parlange rightfully concludes that if that were so, then there was no reason why in this case where diverse citizenship existed and the amount involved exceeded $3000.00, the complainant should not be entitled

to that same relief in the Federal Courts. The foregoing decisions make it quite plain that no State statute could deprive complainant of that right. An admission somewhat similar to that alluded to by Judge Parlange is contained on page 57 of defendant's brief in this Court. He there states that defendant could have instituted in the State Court a separate action coupled with an injunction restraining defendant from executing his judgment on the ground that same was null for want of citation. If this be so, and it is so, no good reason appears why complainant being a citizen of a different State could not bring that new and separate suit and seek injunctive relief in the Federal Court.

Thompson vs. Whitman, 18 Wallace, 457, held:

> "Neither the constitutional provision—that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State—nor the act of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the Court by which a judgment offered in evidence was rendered." (Page 457.)
>
> "Chancellor Kent expresses the same doctrine in nearly the same words, in a note to his commentaries. 'The doctrine in **Mills vs. Duryea,**' says he, 'is to be taken with the qualifications that, **in all instances, the jurisdiction of the Court rendering the judgment may be inquired into,** and the plea of **nil debet** will allow the defendant to show that the Court had no jurisdiction over his person. It is only when the jurisdiction of the Court in another State is not impeached, either as to the subject matter or the person, that the record of the judgment is entitled to full faith and credit.

The Court must have had jurisdiction, not only of the cause, but of the parties, and, in that case, the judgment is final and conclusive." (Page 463.)

In **Gaines vs. Fuentes, et al., 92 U. S., 10,** it was held:

"A suit to annul a will as a muniment of title and to restrain the enforcement of a decree admitting it to probate, is, in essential particulars a suit, in equity; and if, by the law obtaining in a State, customary or statutory, such a suit can be maintained in one of its Courts, whatever designation that Court may bear, it may be maintained by original process in the Circuit Court of the United States, if the parties are citizens of different States."

In **Arrowsmith vs. Gleason, 129 U. S., 98,** the Court held:

"But it is insisted that the Circuit Court of the United States sitting in Ohio, is without jurisdiction to make such a decree as is specifically prayed for—namely, a decree setting aside and vacating the orders of the Probate Court of Defiance County. If by this is meant only that the Circuit Court cannot by its orders act directly upon the Probate Court, or that the Circuit Court cannot compel or require the Probate Court to set aside or vacate its own orders, the position of the defendants could not be disputed. But it does not follow that the right of Harmening, in his lifetime, or of his heirs since his death, to hold these lands, as against the plaintiff cannot be questioned in a Court of general equitable jurisdiction upon the ground of fraud. If the case made by the bill is

clearly established by proof it may be assumed that some State Court of superior jurisdiction and equity powers, and having before it all the parties interested might afford the plaintiff relief of a substantial character. But, whether that be so or not, it is difficult to perceive why the Circuit Court is not bound to give relief according to the recognized rules of equity as administered in the Courts of the United States, the plaintiff being a citizen of Nevada, the defendants citizens of Ohio, and the value of the matter in dispute, exclusive of interest and costs, being in excess of the amount required for the original jurisdiction of such Courts."

See also, **94 U. S., 652, Cirn vs. Hardley; 17 How., 443, Hendrickson vs. Hinckley; 139 U. S., 139, Guaranty Trust Co. vs. Green.**

In **Old Wayne Life Association vs. McDonough, 204 U. S. 15**, it was held:

"The plaintiff in error insists that the Pennsylvania Court had no jurisdiction to proceed against it; consequently, the judgment rendered was void for the want of the due process of law required by the Fourteenth Amendment. If the defendant has no such actual, legal notice of the Pennsylvania suit, as would bring it into Court, or if it did not voluntarily appear therein by an authorized representative, then, the Pennsylvania Court was without jurisdiction, and the conclusion just stated, would follow, even if the judgment would be deemed conclusive in the Courts of that Commonwealth. The constitutional requirement, that full faith and credit shall be given in each

State to the public acts, records and judicial proceedings of every other State, is necessarily to be interpreted in connection with other provisions of the Constitution, and, therefore, no State can obtain, in the tribunals of other jurisdictions, full faith and credit for its judicial proceedings, if they are wanting in the due process of law enjoined by the fundamental law. 'No judgment of a Court is due process of law if rendered without jurisdiction in the Court, or without notice to the party.' **(Scott vs. McNeal, 154 U. S. 34, 46).** No State can by any tribunal or representative, render nugatory a provision of the supreme law. **And, if the conclusiveness of a judgment or decree in a Court of one State is questioned in a Court of another Government, Federal or State, it is open, under proper averments, to inquire whether the Court rendering the decree or judgment has jurisdiction to render** it. Such is the settled doctrine of the Court." (Page 15.)

II b.

THE UNITED STATES CIRCUIT COURT HAS JURISDICTION IN A SUIT BETWEEN THE PARTIES IN INTEREST, CITIZENS OF DIFFERENT STATES, CLAIMING THAT THE JUDGMENT OBTAINED BY ONE VS. THE OTHER IS VOIDABLE FOR FRAUD PRACTICED IN OBTAINING IT.

In **Johnson v. Waters, 111 U. S., 667,** the Court held:

"The administration of General Morgan's succession undoutedly properly belonged to the Probate Court of the Parish of Carroll, and, in a gen-

eral sense, it is true that the decisions of that Court, in the matter of the succession, are conclusive and binding, especially upon those who are parties. But this is not universally true. The most solemn transactions and judgments may, at the instance of the parties, be set aside or rendered inoperative for fraud. The fact of being a party does not estop a person from obtaining in a court of equity relief against fraud. It is generally parties that are the victims of the fraud. The Court of Chancery is always open to hear complaints against it, whether committed in pais or in or by means of judicial proceedings. In such cases the **Court does not act as a Court of review,** nor does it inquire into any irregularities or errors of proceedings in another Court; but it will scrutinize the conduct of the parties, and if it finds that they have been guilty of fraud in obtaining a judgment or decree, it will deprive them of the benefit of it, and of any equitable advantage which they have derived under it." (Page 667.)

"Had the question of fraud been before the Probate Court in any of the proceedings, and had the complainant been apprised of them, the case might have been different. This Court would not try over again a case already tried, nor permit the complainant to litigate matters which he had notice of, and which he had no opportunity to litigate in the probate proceedings. But one of the grounds of complainant made by the bill is that the very attorneys whom he had employed to secure his claim acted as attorneys of the succession and heirs and conducted the proceedings for the sale, and participated as active parties therein, without giving him any notice of what was being done." (Page 669.)

In **Cole v. Cunningham, 133 U. S., 112,** this Court referring to the constitutional provision that full faith and credit should be given in each State to the public acts, records and judicial proceedings of every other State, said:

> "This does not prevent an inquiry into the jurisdiction of the Court in which a judgment is rendered, to pronounce its judgment, nor with the right of the State to exercise authority over the parties or the subject matter, nor whether the judgment is founded in, and impeachable for, a manifest fraud."

In **Marshall vs. Holmes, 141, U. S., 596,** the Court held:

> "While, as a general rule, a defense cannot be set up in equity which has been fully and fairly tried at law, and although, in view of the large powers now exercised by Courts of law over their judgments, a Court of the United States, sitting in equity, will not assume to control such judgment for the purpose simply of giving a new trial, it is a settled doctrine that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a Court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a Court of Chancery." (Citing **7 Cranch, 332, 336; 17 Howard, 443, 445; 94 U. S., 652, 653; 104 U. S., 93, 96; 107 U. S., 3, II; 133 U. S., 152; 98 U. S., 61, 65.)**

"But it is contended that it was not competent for the Circuit Court of the United States, by any form of decree, to deprive Mayer of the benefit of the judgments at law, and that Mrs. Marshall could obtain the relief asked, only in the Court in which the judgments at law were rendered. Is it true that a Circuit Court of the United States, in the exercise of its equity powers, and where diverse citizenship gives jurisdiction over the parties, may not, in any case, deprive a party of the benefit of a judgment fraudulently obtained by him in a State Court, the circumstances being such as will authorize relief by the Federal Court, if the judgment has been rendered by it and not by a State Court? * * *"

"This Court held that the jurisdiction of the Circuit Court depended upon the question whether the action to annul the judgment was or was not in its nature a separate suit, or only a supplementary proceeding so connected with the original suit as to form an incident to it, and to substantially a continuation of it. It is said: 'If the proceeding is merely tantamount to the common law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review or an appeal, it would belong to the latter category, and the United States Courts could not properly entertain jurisdiction of the case. Otherwise, the Circuit Courts of the United States would become invested with power to control the proceedings of the State Courts, or would have appellate jurisdiction over them in a case where the parties are citizens of different State. Such a result would be totally inadmissible. On the other hand, if the proceedings are tantamount to a bill of equity to set aside a decree for fraud in the

obtaining thereof, then they constitute an original and independent proceeding, and, according to the doctrine laid down in **Gaines vs. Fuentes, 92 U. S., 10**, the case might be within the jurisdiction of the Federal Courts. The distinction between the two classes of cases might be somewhat nice, but it may be affirmed to exist.' • • •

"Referring to the provisions of the Louisiana Code of Practice, authorizing an action to annul a judgment obtained through fraud, forgery, the forging of documents, etc., the Court said that it was not disposed to allow the fact that, by the local law, an action of nullity could only be brought in the Court rendering the judgment, or in the Court to which the judgment was taken by appeal, to operate so far as to make it an invariable criterion of the want of jurisdiction in the Courts of the United States. If the Court said: 'The State Legislatures could, by investing certain Courts with exclusive jurisdiction over certain subjects, deprive the Federal Courts of all jurisdiction, they might seriously interfere with the right of a citizen to resort to those Courts.' • • •

"These authorities would seem to place beyond question the jurisdiction of the Circuit Court to take cognizance of the present suit, which is, none the less, an original, independent suit, because it relates to judgments obtained in the Courts of another jurisdiction. While it cannot require the State Court, itself, to set aside or vacate the judgments in question, it may, as between the parties before it, if the fact justify such relief, adjudge that Mayer shall not enjoy the inequitable advantages obtained, by the judgments. **A decree to that effect would operate directly upon him, and**

would not contravene that provision of the Statute prohibiting a Court of the United States from granting a writ of injunction to stay proceedings in a State Court. 'It would simply take from him the benefit of judgments obtained by fraud.'" (Page 599.)

In **Terrehaute and I. R. Co. vs. Peoria & P. U. R. Co., 82 Federal Reporter, 945,** the Court held:

"The Constitution of the United States (Article 3, Par. 2) provides that the judicial powers of the Courts of the United States shall extend to all cases in law and in equity arising under the Constitution, the laws of the United States, treaties or between citizens of different States. The Statutes of the United States have, ever since the original judiciary act, provided that the Circuit Court shall have original cognizance, concurrent with the Courts of the several States, of all suits of a civil nature at common law or in equity arising under the Constitution or laws of the United States, or in which there shall be controversies between citizens of different States. Injunctions to restrain proceedings in a State Court are frequently an incident to a case to which the constitutional and statutory power of the United States Courts is thus extended. An action, for instance, to annul a judgment at law obtained by fraud is a distinct case in equity and can, therefore, be brought within the jurisdiction of the Federal or Circuit Courts if proper diversity of citizenship exists," etc. (Page 945.)

See also, **30 L. R. A., 786, Newman vs. Walters.**

Further citations on this point is made unnecessary for it is conceded by appellant in his brief at p. 36 where he says:

> "although in an appropriate action the Federal Court would have had jurisdiction by virtue of the diversity of citizenship to grant equitable relief from a fraudulently obtained judgment."

III.

ON THE MERITS.

Having thus concluded that the Circuit Court had jurisdiction to enjoin Simon from enforcing his judgment if the same were rendered without citation of defendant and if the same were obtained by fraud, we next inquire:

Was the judgment rendered without citation?

Was it rendered by fraud?

IV.

WAS THE JUDGMENT RENDERED WITHOUT CITATION?

The facts in regard to this matter are as follows:

(A) The prayer of Simon's petition in the State Court is to be found on page 13 of the transcript and reads:

> "Wherefore, * * * petitioner prays that the Southern Railway Company, defendant herein,

be cited to appear and answer hereto, and that, it having failed to comply with the provisions of Section One of Act No. 54 of the Session of 1904, the service of process in this suit be made upon **Hon. John T. Michel, Secretary of State,** said service, so made, to be a service upon the said Southern Railway Company, as provided for in the Act aforesaid," etc.

(B) The citation which issued pursuant to this prayer, is to be found on page 14 of the transcript. It contains the caption of the case and then reads as follows:

"To the Southern Railway Company, **through Hon. John T. Michel, Secretary of State of Louisiana, New Orleans:**

"You are hereby summoned to comply with the demand contained in the petition of which copy accompanies this citation, or deliver your answer to the same, in the office of the Clerk of the Civil District Court for the Parish of Orleans, within ten days after the service thereof.

"Witness the Honorabels **T. C. W. Ellis, Fred D. King, Geo. H. Theard, John St. Paul, W. B. Sommerville,** Judges of the said Court, this second day of December in the year of our Lord 1904.

"(Signed) **L. W. Gunther,** Deputy Clerk."
"Court House opposite Jackson Square."

It is significant that both Simon in drafting his prayer and the Clerk of Court in preparing the citation named

John T. Michel as the man upon whom the service was to be made.

(C) The sheriff's return is on page 15 and reads:

"Sheriff's return on foregoing citation.

"Filed December 6th, 1904.

"Received a certified copy of the within citation and petition on the 3rd day of December, 1904, and on the 3rd day of December, 1904, I served said copies on the within named Southern Railway Company, in the Parish of East Baton Rouge, State of Louisiana, **by personal service on E. J. McGivney, Assistant Secretary of State; John T. Michel, Secretary of State being absent at the time of service.**

"(Signed) **W. J. Milligan, Deputy.**"

The subsequent action taken by the **Assistant Secretary of State** appears from the following letter from him which is to be found in the transcirpt at page 18:

"Baton Rouge, January 28th, 1905.

"Mr. Harry H. Hall,
"P. O. Box 444, New Orleans, La.

"Dear Sir:

"Replying to yours of the 27th inst., I beg to say that acting under the instructions of the Attorney General we simply filed the copy of citation and petition made on us in the case of **'Ephraim Simon versus the Southern Railway Company, No. 74,869,** Civil District Court, Parish of Orleans; the said Company having failed to

designate an agent upon whom service of process can be made as required by law.'

"Yours truly,

"(Signed) **Eugene J. McGivney,**
"Assistant Secretary of State."

The statement was made at the oral argument of this case in the Circuit Court of Appeals that the foregoing letter which conclusively shows that the Southern Railway had no notice or knowledge of the suit in the State Court, was not offered in evidence in the present suit. This statement is contradicted by the transcript at page 197 as follows:

Page 197:

"By Mr. Hall: I offer in evidence • • • a letter from the Assistant Secretary of State, January 28th, 1905, marked 'Exhibit B.'"

No objection, whatever, was made to this letter. Had objection been made its writer would have been sworn as a witness. It stands uncontradicted and unchallenged. Since the citation thus filed was the only citation issued, it proves that the Southern Railway Company received no citation in the suit in the State Court. No attempt was made to contradict its assertion, boldly and comprehensively made, that the Assistant Secretary of State did nothing whatever with regard to the citation except simply file it. In the Court of first instance, no claim whatever was made that the Southern Railway ever heard of Simon's suit until after judgment was

rendered. U. S. Judge Foster says in his opinion at p. 297:

> "The evidence in this case shows and it is not disputed that the complainant had no actual notice of the pendency of the action in the State Court until after the final judgment."

In the Circuit Court of Appeals, after the death of Mr. Harry H. Hall, who tried the case below, it was **for the first time** contended that complainant had not proven want of actual notice, and as stated above, the existence of the letter from the Assistant Secretary of State was disputed. When the letter and its introduction were pointed out the matter was apparently dropped. In this Court appellant devotes several pages of his brief to the matter. By way of reply we desire to point out, first, that the letter of the Assistant Secretary of State conclusively proves that the only citation ever issued in the case was never served upon the Southern Railway. It is not suggested, much less proven that the Southern Railway had any other notice of the pendency of the suit. How or when that corporation first received notice is told by Mr. Harry H. Hall in his **sworn** (not unsworn) statement at Tr. p. 188, where he states that he saw a notice in the paper of the rendition of a judgment against the Southern Railway; that he knew that the Southern Railway was not represented in New Orleans and therefore wrote to Col. Henderson, its Assistant General Counsel at Washington, informing him of the judgment, and that Col. Henderson thereupon came to New Orleans and was informed by him (Hall) of

the facts and circumstances surrounding the judgment. That he was thereupon requested by Col. Henderson to file a bill in the U. S. Court to annul and set aside the verdict and judgment rendered in the Civil District Court for the reasons and upon the grounds set forth in the bill herein (Tr. p. 188). That is for the reason among others that the Southern Railway had no notice of the litigation until after the rendition of the judgment. In addition to this the bill avers that Simon's suit was filed "surreptiously and without the knowledge of" the Southern Railway. The bill is verified in the only way that the bill of a corporation can be verified, by affidavit of an executive officer who swears that the allegations are true to the best of his knowledge and belief.

In view of all this, it is indeed late for appellant to come before this tribunal and to suggest that the Southern Railway had any notice of the suit.

Moreover, the question whether the Southern Railway did or did not have notice of the suit is a question of fact. Judge Foster (Tr. p. 297) found it had no such notice. This finding was affirmed by the Circuit Court of Appeals. (Tr. p. 310). This Court has repeatedly held that it will not, except in clear cases, disturb a finding of facts concurred in by both inferior Courts. **Gilson vs. U. S,. 234, U. S. 380; T. & P. Ry. Co. vs. La. R.R. Commission, 232 U. S. 338.**

(E) Louisiana Act 54 of 1905 is quoted by Judge Foster in his opinion (Tr., p. 296) by the Circuit Court of Appeals at transcript page 311. It reads as follows:

> **"Section 1—Be it enacted by the General Assembly of the State of Louisiana, That it shall be**

the duty of every foreign corporation doing any business in this State to file in the office of the Secretary of State a written declaration setting forth and containing the place or locality of its domicile, the place or places in the State where it is doing business, and the name of its agent or agents or other officer in this State upon whom process may be served.

"Section 2—Be it further enacted, etc., That whenever any such corporation shall do any business of any nature in this State without having complied with the requirements of Section 1 (One) of this act, it may be sued for any legal cause of action in any parish of the State where it may do business, and such service of process in such suit may be made upon the Secretary of State the same and with the same validity as if such corporation had been personally served."

It appears, as shown above, that the Southern Railway Company had no knowledge, whatever, of Simon's suit until after the judgment was rendered and, therefore, had no opportunity of any kind to defend itself. Under the foregoing undisputed facts, three questions present themselves:

A. Was Act 54 of 1904 which provides for service on the Secretary of State complied with by the service on the Assistant Secretary of State?

B. Was the Southern Railway Company doing business in the State of Louisiana in such a sense as to be subject to process in that State?

C. Does Act 54 of 1904 constitute due process of law if it means that citation can be served on the Assistant

Secretary of State and by him destroyed or pigeonholed so that the defendant corporation is never apprised of the existence of the suit against it.

IV a.

WAS ACT 54 OF 1904 COMPLIED WITH?

The Circuit Court of Appeals found that Act 54 of 1904 was not complied with. Its decision is as follows (Tr., p. 310):

> "3. As to the service of process and validity of the judgment rendered by the State Court against the appellee.
>
> "A copy of the citation was served upon the Assistant Secretary of State who simply deposited it among the files of his office. The appellee had no notice of the suit. Judgment by default was taken and damages were assessed by the jury. Was the service sufficient? The pertinent act of the Legislature of Louisiana, reads as follows:
>
> " 'Section 1. Be it enacted by the General Assembly of the State of Louisiana, That it shall be the duty of evrey foreign corporation doing any business in this State, to file in the office of the Secretary of State, a written declaration setting forth and containing the place or locality of its domicile, the place or places in the State where it is doing business, and the name of its agent or agents or other officer in this State upon whom process may be served.
>
> " 'Section 2. Be it further enacted, etc., That whenever any such corporation shall do any busi-

ness of any nature, whatever, in this State without having complied with the requirements of Section 1 (One) of this Act, it may be sued for any legal cause of action in any parish of the State where it may do business, and service of process in such suit may be made upon the Secretary of State the same and with the same validity as if such corporation had been personally served.'

"Session Acts 1904, pages 133-4.

"Prior to filing the suit in the State Court, the appellee had not named an agent upon whom process might be served, and, as before stated, service was had upon the Assistant Secretary of State. We are of the opinion that service upon the Assistant was not the equivalent of service upon the Secretary of State. It is the fundamental principal of our jurisprudence that a person, whether artificial or natural, must have the opportunity of a hearing before being condemned. 'It is' said the Supreme Court; a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has his day in Court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination. It is judicial usurpation and oppression and never can be upheld where justice is justly administered.' Galpin vs. Wall. 18, Wall 368-9. See also, **Pennoyer vs. Neff, 95 U. S., 714; Scott vs. McNeal, 154 U. S., 34**)

"The method of service, indicated by the Statute, was not pursued in this case, and, employing the language of the Supreme Court, 'the cases are numerous which decide that where a particular method of serving process is pointed out by

Statute, that method must be followed, and the rule is especially exacting in reference to corporations.' **(Amy vs. Watertown, 130 U. S., 316, 317;** citing numerous authorities.) And in the same case, at pages 317, 318 of **130 U. S.**, the Court quotes approvingly, the following language of the Supreme Court of Wisconsin, used by the latter in the **City of Watertown vs. Robinson, 69 Wis., 233, 236, 237:**

" 'When the Statute prescribes a particular mode of service, that mode must be followed. **Ita lex scripta est.** There is no chance to speculate whether some other mode will not answer as well. This has been too often held by this Court to require further citations. • • • When the Statute designates a particular officer to whom the process may be delivered, and with whom it may be left, as service upon the corporation, no other officer or person can be substituted in his place. The designation of one particular officer upon whom service may be had excludes all others. The temporary inconvenience arising from a vacancy in the office of Mayor, affords no good reason for a substitution of some other officer in his place, upon whom service could be made, by unwarrantable construction not contemplated by the Statute.'

' The service of the citation upon the Assistant Secretary of State, was not a compliance with the requirements of Act 54 of the Legislature of Louisiana, and such service was, therefore, unavailing to bring the appellee into Court. Since then, there was neither valid service of process nor voluntary appearance on the part of the appellee, the judgment by default was void for the want of jurisdiction of the person.

"The conclusion reached by the Court renders it unnecessary to call in question, the constitutionality of Act 54 quoted above. But see **Gouner vs. Missouri Valley Bridge & Iron Co., 123 La., 964.**"

Hon. Charles F. Buck, Special Master, discussed this question on pages 162, 163, 164, 165 of the transcript as follows:

"First: Is it, judicially speaking, right to assume the process served on the Assistant Secretary of State, is process served on the Secretary of State?

"I have been unable to find guidance or authority on the point.

"Sec. 2 of Act of 1904 (Act 54, page 134) provides in this regard * * * 'And service of process in such suit may be made upon the Secretary of State the same and with the same validity, as if such corporation had been personally served.'

"The Statute imposes no duty on the Secretary and to say that a manifest duty suggests itself, would be to legislate something into it, which is not there. The Statute makes possible a violation of a fundamental principle briefly and beautifully stated by Mr. Justice Field in **St. Clair vs. Cox, 105 U. S., 356,** a case involving similar issues. Speaking of the right of the State to provide by special legislation the conditions, in which 'foreign Corporation' may be served with process, he says:

" 'Such condition must not, however, encroach upon that principle of natural justice which requires notice of a suit to a party before he can be bound by it.'

"A Statute which provides a substituted service of process through a public officer, without im-

posing any duty in regard to it, comes perilously near to an encroachment of that principle:—the Statute and action under it must at least run the gauntlet of strict construction.

"Who or what is the Assistant Secretary of State? He is not elected by the people nor appointed by the Governor. He is an aid to the Secretary of State, who has authority or option "to appoint an assistant who shall be known as Assistant Secretary of State." (Here there is a break in the Art. of the Constitution (Art. 79) it proceeds **Sic** "or in case of his disability to act under the directions of the Secretary of State shall have authority to perform all the acts and duties of the Office of Secretary of State."

"This from Art. 79 of the Constitution of 1898. In 1904 the Statute in question is enacted and it requires service on the 'Secretary of State;' not in the office of the Secretary nor on the Assistant, if he should have one nor on any representative.

"The service does not show even that it was made at the office of the Secretary; it was made (quoting)'on the within named Southern Railway Company, in the Parish of East Baton Rouge, State of Louisiana, by personal service on E. J. McGivney, Assistant Secretary of State, John T. Michel, Secretary of State, being absent at the time of service.'

N. B.—It should be noted that the copy of Art. 79 of the Constitution added as an appendix to appellant's brief, is incorrect as it adds in that article the vital words, "and in the absence of the Secretary of State," correcting the hiatus noted by the master.

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5

"This 'Assistant' is appointed at the option of the Secretary and may be removed at pleasure.

"He is nowhere designated as an officer of the State and there is no provision requiring him to take an oath. His salary is payable out of an appropriation of twenty-five hundred dollars authorized for 'clerical expenses' of the Secretary of State.

"Manifestly under the terms of the Articles of the Constitution, he is a mere clerical Assistant to the Secretary with authority to perform such official acts as the Secretary deems proper to 'direct' him to perform and to act for him because of 'disability.'

"There is no proof that the Secretary of State delegated the important duty of receiving 'process to bring foreign corporations into Court, to his Assistant.—Clearly there can be no legal presumption that he had done so.

"Mere 'absence' of the Secretary 'at the time' does not vest authority in a clerk of the office.

"If the Secretary's absence were permanent, the Governor would appoint the successor:—the Assistant Secretary (?) has no existence as a State Officer and can only do things the Secretary requires or 'directs' him to do. He is in no sense his official representative, except in case of the Secretary's disability.

"To hold therefore that process served on such a person is service on the Secretary of State—would be to hold that it would be a good service to leave the papers (process) at the office of the Secretary of State, through any person connected with it convenient at the time.

"Such a construction is at once repugnant to common sense and common justice.

"True, the law in terms imposes non (no) duty on the Secretary of State, in regard to the process served on him, and it might be argued, such being the case, that the result is in either event the same.

"Secretary of State might say for argument sake he would have done no more and no less than he did do—nothing.

"But that does not answer the point, the fact remains the Statute requires service on him; it is a special Statute intended to produce a special and extraordinary effect—and there can be no escape from the conclusion that to produce the intended effect, it must be literally complied with.

"The service must be on the Secretary of State, or there is no service.

"Without therefore passing on the question whether a Statute providing for substituted service, which requires no notice of any kind to the party to be affected, is constitutional or due process of law,—I conclude that service of process in the case of **Ephraim Simon vs. the Southern Railway Company** on E. J. McGivney, Assistant Secretary of State, is not the service required by Section 2 of Act No. 54 of the Acts of 1904, on which a personal judgment could be rendered and said judgment is therefore null for want of legal and valid citation.

"That the rule of strict construction applies, see **Otis vs. Boswell, 9 How. 350; Harris vs. Hardeman, 14 How., 345; Galpin vs. Page, 18 Wall., 369.**

"Since writing the foregoing, I am referred to Sect. 3523 of the R. S. defining the powers and duties of the Assistant Secretary of State.

"Under this Statute he is authorized to perform all, or any of the duties or official acts required

by law of the Secretary of State 'during the sickness or absence for any cause' of the latter.

"I do not think that part of the Statute, obliging him to perform 'such duties pertaining to the office as may be required of him by the Secretary,' need be considered. It manifestly refers to the routine work of the office and is independent of that function which makes him the 'official' in the case 'of sickness or absence' of the Secretary.

"This language is very broad; the effect to be given depends on the scope of the word 'absence;' if it means that the Assistant becomes vested with official function for the moment, when the Secretary may be out of the office—then all the above logic and conclusion fall to the ground; if it means absence absolute for the time being, so that in effect the Assistant becomes **pro tempore** Secretary of State—something more should appear than the declaration of the officer, making the service that the Secretary was 'absent at the time.'

"Sect. 3523 refers to an oath to be taken, as required by the Constitution. The Constitution of '98 contains no requirement in that regard. Besides where this Section and the Constitution of 1898 conflict the latter prevails.

"It is claimed that the point is not made in the pleadings by the complainant. The issue as to the validity of a constructive citation; and it seems to be that matter apearing on the face of the papers can and should be considered.—It is also claimed by complainant that the Act (54) is unconstitutional.

"However, the Master concedes that the terms of the Statute raise a serious doubt as to the correctness of the conclusion stated, but having (having) dealt with the question, let the matter

stand as it is, for the Court to act on its own good judgment."

That the Circuit Court of Appeals' and Special Master's view that service on the Assistant Secretary of State was not service on the Secretary of State within the meaning of the Statute, was the correct view, is shown by the following authorities:

17 L. R. A., 352, Lonkey vs. Keyes Silver Mining Co.:

"The attorney for the appellant contends 'that the service of process upon the Deputy Secretary of State was not a service upon the Secretary and was not a compliance with the Statute under consideration.' The law in relation to service of process on foreign corporations must receive a strict construction, and the service must be made upon the officer or person mentioned in the Act of the Legislature. The cases are numerous which hold that, where a particular method of serving process is pointed out by the Statute, that method must be followed, and the rule is especially exacting in reference to corporations. Was the service upon A. Helm, Deputy Secretary of State, (the Secretary being absent from State), a compliance with the Act of 1889? **The service upon the deputy was certainly not sufficient,** unless we can disregard the plain reading of the Statute, which says: "If any such company shall fail to appoint such agent, then it shall be lawful to serve such company with any and all legal process by delivering a copy to the Secretary of State.' The Statute does not require the copies to be filed nor does it make them a part of the records of the

> Secretary's office, nor require of that officer the performance of any duty in connection therewith, whatever. It merely, for the time being, makes that particular individual occupying the office of the Secretary of State, the agent of the corporation for the particular purpose of receiving service of all process issued against a foreign corporation, where it has failed to appoint an agent as required by the Act. Sec. 1799, Nev. Gen. Stat., definies the duties of the Deputy Secretary of State during the absence of the Secretary of State to be of a 'ministerial nature, belonging to the office.'"

In the case of **Watertown vs. Robinson, 69 Wis. 233,** the Supreme Court of the State said:

> "When the Statute prescribes a particular mode of service, that mode must be followed. **Ita lex scripta est.** There is no chance to speculate whether some other mode will not answer as well. This has been too often held by Courts to require further citations. When the Statute designates a particular officer to whom the process may be delivered, and with whom it may be left, as service upon the corporation, no other officer or person can be substituted in his place. The designation of one particular officer upon whom service may be made, excludes all others. This language was afterwards approved and adopted by the Supreme Court of the United States in the case of **Amy vs. Watertown, 130 U. S. 317, 32 L. Ed. 951, 2 Beach Cor. Par. 859, Tallman vs. B. and O. R. R. 45 Fed. Rep. 156.** In **Chambers vs. King Wrought Iron Bridge Co., 16 Kansas, 276,** the Court said:

'But service of summons on a corporation cannot be made on every person who may, in some remote sense, be styled a clerk of the corporation. It could not be made on a deputy or under clerk. It must be made on the clerk—the principal clerk —of the corporation, if made on a clerk at all. It must be made on a person who holds the office of Clerk or Secretary, although such person might not in fact perform any of the clerical duties for the corporation.' In **Winslow vs. Staten Island R. T. R. Co., 21 N. Y. S. R. 787,** service of summons on the Assistant Treasurer was held to be void 'for the reason that he was not the president or other head of the corporation, the secretary or clerk to the corporation, the cashier or treasurer, or a director or managing agent." See also **Watertown vs. Robinson, 59 Wis. 515; Mariner vs. Waterloo, 75 Wis. 440; Alexandria vs. Fairfax, 95 U. S. 79, 24 L. Ed. 585; Kennedy vs. Hibernia Savings and Loan Society, 38 Cal. 154, Aiken vs. Quartz Rock Maripoza G. Min. Co., 6 Cal. 186; Cloud vs. Pierce City, 86 Mo. 362, Wil Lamette F. C. M. & T. Co. vs. Williams, 1 Or. 112, 113; Scorpion Min. Co. vs. Marsano, 10 Nev. 376; Blanc vs. Paymaster Min. Co. (Cal.) 30 Pac. Rep. 765; Jepson vs. Cable Co., 20 New York Supp. .... Kibbe vs. Benson, 84 U. S. 17; 17 Wall. 627, 21 Law Ed. 742; Reinhard vs. Luigo, 86 Cal. 395.**

"It was not designated by the Legislature that a service of process upon the Deputy Secretary of State should be deemed sufficient to bring a corporation into Court. We are, therefore, compelled to hold that the service in this case gave the Court no jurisdiction of the defendant."

130 U. S. 302 Amy vs. Watertown. In this case, this Court said:

> "When a State Statute prescribes a particular method of serving mesne process, that method must be followed. And this rule is specially exacting in reference to corporations."
>
> "The provisions of the Revised Statutes of Wisconsin, which require service of process generally on cities to be by delivering a copy thereof to the Mayor and the City Clerk and the provisions of the Charter of the City of Watertown which require such service to be made by leaving a copy with the Mayor have been held by the highest Court of the State to be peremptory and to exclude all other officers, and it has been held also that the fact that there is a vacancy in the office of Mayor, does not authorize service to be made upon some other substitute officer. And this Court concurred with that Court in this construction. **(P. 317.)**
>
> "The cases are numerous which decide that where a particular method of serving process is pointed out by Statute, that method must be followed, and the rule is especially exacting in reference to corporations. **Kibbe vs. Benson, 17 Wall. 624; Alexandria vs. Fairfax, 95 U. S. 744; Settlement vs. Sullivan; 97 U. S. 444; Evans vs. Dublin, etc. Railway, 14 M. & W. 142; Walton vs. Universal Salvage Co., 16 M. & W. 438; Brydolf vs. Wolf Carpenter & Co., 32 Iowa 509. Hoen vs. Atlantic & Pacific Railway Co. 64 Mo. 561, Lehigh Valley Ins. Co. vs. Fuller, 81 Penn State 398.** The Courts of Wisconsin strictly adhere to this rule. **Congar vs. Railroad Co. 17 Wis. 477, 485; City of Watertown vs. Robinson, 59 Wis. 513; City of Watertown vs. Robinson, 69 Wis. 230.** The two cases

last cited related to the charter now under consideration. In the first case, service was made upon the City Clerk and upon the Chairman of the Board of Street Commissioners, whilst the Board was in sesion, in the absence of the Mayor, who could not be found after diligent search. The Court, after referring to the provisions of the charter and the Revised Statutes on the subject, say: 'The question as to whether the Revised Statutes control as to the manner of service is not a material inquiry here, because both the charter and the general provision require the service to be made upon the Mayor, but no service was made upon that officer as appears by the return of the sheriff. The principle is too elementary to need discussion, that a Court can only acquire jurisdiction of a party, where there is no appearance, by service of process in the manner prescribed by law.' In the last case, (decided in 1877) service was made in the same manner as in the previous one, and the Court say: 'When the Statute prescribes a particular mode of service, that mode must be followed. **Ita lex scripta est.** There is no chance to speculate whether some other mode will not answer as well. This has been too often held by this Court to require further citations. * * * When the Statute designates a particular officer to whom the process may be delivered, and with whom it may be left, as service upon the corporation, no other officer or person can be substituted in his place. The designation of one particular officer upon whom service may be made excludes all others. **The temporary inconvenience arising from a vacancy in the office of Mayor affords no good reason for a substitution of some other officer in his place, upon whom ser-**

vice could be made, by unwarrantable construction not comtemplated by the Statute."

135 U. S. 318.

45 Federal Reporter 156. Talman vs. The B. & O. Railway Co.

"Under the Revised Statutes of Ohio, Par. 5044, which provide that process against a Railroad Company may be served upon any regular ticket or freight agent thereof, a return that the services was served upon a ticket agent and general agent of the defendant is defective in not showing that the person served was a regular ticket agent."

See also, 91 U. S., 507, Earle vs. McVeigh.

"Rules permitting substituted service are to be rigidly construed."

136 F., 1004, Gage vs. Trust Co.; 166 Fed. 343, Swarts vs. Christie; 137 Fed., 206; King vs. Davies; 95 U. S., 780, Alexandria vs. Fairfax; 97 U. S., 447, Semmens vs. Sullivan.

We submit that the foregoing facts taken in connection with the law quoted, show conclusively that the requirements of Act 54 of 1904 were not complied with by Simon and that, therefore, his judgment may be said on this ground, to have been secured without citation of the defendant railway company. In his brief in this Court Simon contends that this point was not raised by the pleadings. We have refuted this contention infra Chapter V.

Appelant refers to Article 79 of the Constitution of 1898, to Sec. 3523 of the Revised Statutes and to the decision of the Court in State vs. Clark, 46 An. 1409, as justi-

fying the service on the Assistant Secretary of State. Turning to Article 79 of the Constitution of 1898, we find that it reads in part:

> "Provided, the Secretary of State shall have authority to appoint an Assistant who shall be known as Assistant Secretary of State, or in case of his disability to act or under the directions of the Secretary of State, the Assistant Secretary of State shall have authority to perform all the acts and duties of the office of Secretary of State."

Appellant in his brief in this Court at page 79 quotes in article as reading:

> "Provided, the Secretary of State shall have authority to appoint an assistant who shall be known as Assistant Secretary of State, **and in the absence of the Secretary of State,** or in case of his disability to act or under the directions of the Secretary of State the Assistant Secretary of State shall have authority to perform all the acts and duties of the office of Secretary of State."

The vital words, "and in the absence of the Secretary of State" are however not in the article as it appears in the Louisiana Constitution. This is important here as the sheriff's return recites that the service was made on E. J. McGivney, Assistant Secretary of State, Jno. T. Michel, Secretary of State, being absent at time of service.

We therefore have the Constitution, the organic law of the State, providing when the assistant may act and confining the right to so act to the case of disability of

the Secretary of State. The organic law therefore by the doctrine **expressio unius exclusio alterius** prohibits the Assistant Secretary from acting in any case save disability of the Secretary. This being so, no statute could give any additional power to the Assistant Secretary without being unconstitutional.

Moreover, as was pointed out by the Special Master Mr. Buck, even should Art. 3523 of the Revised Statutes be permitted to override Art. 79 of the Constitution which we submit cannot be the case, that Article can hardly be said to mean that when the Secretary of State steps momentarily out of his office the Assistant Secretary can act. When it refers to absence it uses that term in the sense of absent from the State, and there is no showing of such an absence made in this case. Nor is this all. The Act 54 of 1904 as is clearly indicated by the authorities quoted, **supra,** is a statute which is to be rigidly construed. It is in derogation of common right. Had the lawmaker so elected he could have provided that the service was to be made in the office of the Secretary of State or on the acting Secretary or on the Secretary or Assistant Secretary of State. But he did not do so; he provided that the service should be made on the "Secretary of State." For the reasons given in the authorities quoted, this language precludes service any other person.

Nor is the **Clark case,** dealing as it does with the purely clerical act of certifying a document, such an act as every deputy clerk of Court and every deputy recorder habitualy performs without question, any authority to the contrary.

IV b.

WAS THE SOUTHERN RAILWAY COMPANY DOING BUSINESS IN LOUISIANA IN SUCH A SENSE AS TO BE SUBJECT TO PROCESS IN THAT STATE?

On this subject, the Special Master ruled as follows. (Tp. 165):

> "On the second point I reach the conclusion that the complainant, the Southern Railway Company, **WAS NOT DOING BUSINESS** in the sense of the Statute under which it is attempted to be brought into Court by the 'constructive' or 'substituted' service through the Secretary of State.
>
> "True, the wording of the Statute is very broad: 'Whenever any such (foreign) corporation shall do any business of any nature whatever in this State * * * it may be sued in any parish of the State where it may do business, etc.'
>
> "But 'any business of any nature whatever' after all can only mean that it is doing business in the State as a corporation—perhaps as the corporation for which it is organized and exists.
>
> "It would lead to the rankest absurdities to take the words literally as meaning that any business transaction whatsoever would hold the corporation as 'doing business' in the State. Suppose, for instance, that the Southern Railway Company had so-called treasury stock for sale and sells some, even through a broker, on a public exchange—would anyone contend that such a transaction would be doing business in the State with the effect of subjecting the company to the jurisdiction of the Courts by process served on the Sec-

retary of State on any cause of action? Or suppose the company places a bond issue on the market and some one buys some of these bonds, in New Orleans, and pays for them here, would such result follow?

"It may be borne in mind that a distinction runs through legislation and jurisprudence between the case, where the foreign corporation comes into Court as a plaintiff, having violated or being charged with violation of a Statute—and where the Statute is intended to bring the corporation in by constructive service of process, as a defendant.

See Cyc. of Law and Procedure, Vol. XIX, 1267, 68.

"The facts relative to the office of Mr. J. C. Andrews, occupying an office in a prominent building in the center of the City, on the windows of which it is advertised in demonstrative and showy signs as the ticket office of the Southern Railway Company and his business of selling passenger tickets, etc., would probably, were the matter new, cause me to hold that the Southern Railway Company was doing business in this State.

"But the purpose and objects and the limit of Mr. Andrews' agency (?) is explained by the evidence bringing the case in that regard squarely within the scope of **Green vs. Chicago & Burlington & Quincy Railway, 205 U. S. 530.**

"The syllabus of that case governs this in every detail; but there is a slight variance as to the manner in which the agent (?) did his business. In that case the agent or ticket seller did not furnish the tickets direct over the connecting routes to that of the defendant Co. He took the money;

produced a ticket over roads west of Philadelphia and gave a 'prepaid order' for a ticket to be given the traveler on arrival in Chicago.

"In the case at bar, the L. & N. R. R. furnish the tickets over their line and connecting lines to Mr. Andrews and he sells them and receives the full price of the ticket. The effect—the actual transaction, is the same.

"This same point is expressly held in **Maxwell vs. Atchison R. Co., 34 Fed. 286,** cited in **205 U. S.** above. It must be stated, however, that in this case the alleged agent had authority only to solicit business, not to sell tickets.

"But in **Earle v. Chesapeake & O. Ry. Co., 127 Fed. 235,** also cited in **205 U. S.,** the facts were stronger against the company than in that case. (See page 236.) I am not unmindful of quite a current of authority which holds that under Statutes providing against doing 'any business' a 'single act of business' if it be in the exercise of the regular business of the corporation falls within such Statutes. But the decisions contra-wise predominate and I will not attempt to reconcile or differentiate them. I base my conclusion on the dictum of **Cyc. of Law and Procedure, 19 p. 1268, No. 3.**

"Solicitor for defendant invokes **Farrior vs. New England Mortgage Ry. Co. (Ala.) 7 S. R. p. 200** and **State vs. Bristol Sav. Bank (Ala.) 18 S. R. 533.**

"The latter of these cases is hardly in point for any purpose. It was an action by the State for a penalty for doing business, and is decided on the Statute which however is not quoted.

"Besides in this as in the case of **7 S. R.,** the 'business' was an act 'full in the course of the

corporation's regular business as an investor of money.' The Court at page 200, No. 3, says:—

" 'The bill alleges that the complainant corporation under its charter and laws of incorporation, had full power and authority to loan money and take mortgage in controversy. In engaging in such a transaction, the complainant was in the exercise of its chief corporate function as imported by its very name and as admitted by the bill. The prohibition of the Constitution is against doing 'any business in this State without compliance with the conditions specified. The doing of a single act of business, if it be in the exercise of a corporate function is as much prohibited as the doing of a hundred such acts.'

"It suffices to say that in both these cases,—without reference to the distinction where the corporation sues—and where it is sought to hold her on constructive service,—the acts of business done were 'in the exercise of their chief corporate functions.' It would be same as if the S. Railway Co had constructed tracks and run a train over them.

"This leads to the question partly covered by what is included in above—whether the interest of the Southern Railway Company as stockholder in the **TERMINAL COMPANY** given in the statement of facts— brings the company within the Statute as doing business in this State.

"It will be remembered that the Southern Railway Company is owner of one-half of the capital stock of said company with privilege to substitute some one else or enjoy the rights of lessee conjointly with others. that it is an endorser on the bonds of the Terminal Company and finally the profits if any are made over and above operating expenses inure to its benefit because they must be

applied to the payment of interest and redemption of bonds on which the Southern Railway Company is bound as an endorser.

"The company makes no use of its lease; it operates no trains over the tracks for either passenger or freight traffic. Some of its freight cars with through freight come in and are 'belted' over these tracks in connection with trains operated by roads coming into the city.

"Is this 'doing business' in the sense of the Statute? I think not.

"This phase of the case in (is) partly covered by **Earle vs. Chesapeake O. R. Co., 127 Fed. 235,** but more especially by **Peterson vs. Chicago, Rock Island & Pac. Ry., 205 U. S. 390.** Every line of that case is applicable to this and disposes of any contention that the ownership of stock in the Terminal Company is to be considered an act of business in the sense of the Statute.

"The holding of property in ownership or as lessee (especially when not used) is not doing business. **Cyc. of Law and Practice, Vol. 19—1269.**

"Solicitor for defendant refers to Section 1 of Act No. 74 of 1902. It suffices to say that that Section, and the entire act, contemplates leases and operating contracts between railway corporation (corporations), operating lines of railway; besides manifestly only the company actually operating the roads whether as owner or lessee, would be doing business in this State.

"The following additional authorities are submitted for reference.

"That selling tickets is not 'doing business.' **8 Abbott P. R. N. Y. 427.**

"Owning stock in another corporation. **Com. vs. Standard Oil, 101 Pa. State, 119.**"

As stated by the Master, the "doing business" charged consists of three items:

1. Mr. Andrew's office in the St. Charles Hotel.
2. Mr. Graham's office in the Morris Building.
3. The interest in the New Orleans Terminal Co.

We shall now give in detail the facts as to each.

IV b 1.

MR. ANDREWS' OFFICE.

The facts in connection with the operation of that office, are thus tersely stated by Mr. Andrews himself. (Tr. p. 64):

> "**John C. Andrews**, being sworn, says that he is by occupation a ticket agent, selling tickets in the City of New Orleans, that all the tickets sold by him **ARE FURNISHED BY THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY**, and that all of his correspondence and communications concerning the sale of tickets is with the said Louisville and Nashville Railway Company in the City of Louisville.
>
> "That many of said Louisville and Nashville Railroad tickets call for transportation over other lines of railroad and as far as the City of New York.
>
> "That many of the said tickets call for transportation over the lines of the Southern Railway Company, but none of the said lines are reached at a point nearer the City of New Orleans, than the City of Atlanta, in Georgia.

"And affiant says that he has no further and other connection with the said Southern Railway Company except such as incidentally results from the sale of such tickets for transportation outside of and beyond the limits of the State of Louisiana, and that all the persons traveling on transportation thus sold by him are conveyed on trains of the Louisville and Nashville Railroad Company and no other, through and out of this State."

This statement is fully borne out at transcript page 205, by the following testimony of **W. W. Finley**, then President of the Southern Railway Company, who swears:

"It is not a fact that Southern Railway Company maintains for the transaction of its business in the City of New Orleans, two offices, one under the jurisdiction of J. C. Andrews, its authorized representative and agent, for the transaction of its passenger business, and the other under the direction of James B. Graham, its freight agent, for the transaction of its freight business, with authority to issue bills of lading for freight received at this end and to be shipped over its lines and the connecting carriers thereof and to make freight rates for shipment in New Orleans of freight of every character for the Southern Railway Company through its connecting carriers into the City of New Orleans.

"Southern Railway Company does employ the gentlemen named, as stated in my direct examination, **only for the purpose of soliciting traffic, and for the performance of duties in connection with the solicitation of traffic to be routed via the lines**

of the Southern Railway Company. They have no authority whatever to issue and do not issue bills of lading, and they have no authority to make and do not make rates. They have on file and publish rates for the information of the public, but they have nothing to do with the making of them. Their duties are to solicit traffic for Southern Railway Company. They are in the employment of Southern Railway Company and are paid by it for the purpose aforesaid, and Southern Railway Company pays rent for their offices for such use. It is not a fact that no other representative or agent of Southern Railway Company is vested with greater power than the agents named, except for the service of citation, or was in the months of December, 1904, and January, 1905. The authority of the two agents named is limited as above stated to the solicitation of traffic for transportation by Southern Railway Company."

Besides this it is corroborated by the record, pages 244, 251 and 252, and **IS NOWHERE CONTRADICTED.**

In view of this evidence, Mr. Andrews' statement of the nature of his employment may be taken as correctly stating the facts.

IV b 2.

MR. GRAHAM'S OFFICE.

The testimony of the complainant on the subject of this office is that of **W. W. Finley, page 205,** quoted **supra.**

The Court's particular attention is called to his statement, reading:

> "The Southern Railway Company does employ the gentlemen named as stated in my direct examination **only for the purpose of soliciting traffic,** and for the performance of duties in connection with the solicitation of traffic to be routed via the lines of the Southern Railway Co. They have no authority whatever to issue and do not issue bills of lading and they have no authority to make and do not make rates."

As against this, there is nothing in this record except the worthless affidavit of E. Simon, the defendant, which is to be found on page 81 and which reads, in part:

> "Respondent further says that **he is advised and informed** and believes, and **therefore,** avers the fact to be that Graham is the freight soliciting agent of the Southern Railway Co. in the City of New Orleans, representing this company, soliciting business in its behalf, and, at times, entering into contracts in the City of New Orleans on behalf and for account of the said Southern Railway Company."

We have used the word "worthless" above, because the affidavit shows on its face, that it is made, not of personal knowledge but on information and belief. Such an affidavit is worthless as against the direct positive affidavit of Mr. Finley.

Beyond this affidavit, Simon has no testimony in the record, except two letters of Mr. Edward Rightor and Mr. Samuel Trufant (Tr., p. 271), stating that the Southern

Railway Company rented offices in the City of New Orleans. (The soliciting offices of Graham and Andrews.)

Your Honors, therefore, have Mr. Finley's solemn oath against a statement of Simon which he is careful to explain that he makes 'because he is advised, informed and believes.' If he was so informed, where are his informers? They were not called upon to testify in this suit.

It may, therefore, safely be said that this record conclusively shows that Graham's only duties to the Southern Railway Company were the solicitation of business.

Before leaving this subject, however, we desire to scotch a snake.

On page 263, et seq, are to be found several documents purporting to be dray receipts. As printed in the record they appear to have the words Southern R. R. printed upon them, and might, therefore, produce the impression that they were receipts issued by the Southern Railway Co. Nothing could be further from the fact, which is that the words Southern R. R. are simply **ROUTING INSTRUCTIONS NOTED ON THESE DOCUMENTS BY SIMON** in handwriting when same were delivered to another carrier.

IV b 3.

THE INTEREST IN THE TERMINAL COMPANY.

There is no dispute as to the facts in this matter. Let us then state them as tersely as possible.

The New Orleans Terminal Company is a common carrier engaged in interstate commerce. It is a distinct poration, a separate entity from the Southern Railway. It owns and operates certain terminal facilities and tracks at New Orleans. The capital stock of the company was owned at the time of the filing of Simon's suit one-half by the Frisco Railroad, and one-half by the Southern Railway and its bonds were guaranteed by both the Frisco and the Southern.

The reason for the Southern's connection with the Terminal Company and the other facts in connection with the matter are thus stated by Mr. W. W. Finley, (Tr., p .199):

> "The Southern Railway Company is the owner of certain shares of stock of the New Orleans Terminal Company , its interest in which and the resultant interest in the properties owned by the New Orleans Terminal Company, the Southern Railway Company acquired by reason of the development of the City of New Orleans as an important commercial and export point, and in anticipation of the possible extension, at some future day, of the lines of Southern Railway Company into the City of New Orleans.
>
> "Under and by virtue of a joint lease, dated July 1, 1903, for the term of ninety-nine (99) years, New Orleans Terminal Company leased to St. Louis & San Francisco Railroad Company and Southern Railway Company the right to use the terminal facilities and belt railroad and other property of the New Orleans Terminal Company for the purpose of the traffic of the several lessees. The said rights were thus leased to the said lessees with the understanding that the said Terminal

Company might grant to other lesses or rail road companies similar privileges and use, and in consideration of such right to use, and such privileges, said lessees undertook to pay certain sums of money equal to the semi-annual interest on the outstanding bonds of New Orleans Terminal Company and such sums as might be necessary to make good any deficit in the cost of operation of the property of the New Orleans Terminal Company in case the earnings thereof should not suffice to the discharge of said interest and deficit. The lessees were also given the right to nominate a subtenant or sub-tenants to use the railroad and terminal facilities of the New Orleans Terminal Company. **The operations of the New Orleans Terminal Company are conducted solely by it.** In the joint lease of July 1, 1903, above referred to, it is specifically provided that the granting of said rights and privileges shall not be taken in any manner to afford or abridge any of the corporate franchises or powers of the New Orleans Terminal Company and that the operations of its terminal facilities and railroad shall be exclusively under its control.

"St. Louis & San Francisco Railroad Company for a time availed itself of its rights under said lease to use the said terminal facilities and railroad of the New Orleans Terminal Company and operated its trains into New Orleans. The New Orleans and Northeastern Railroad Company uses the properties, and the New Orleans Great Northern Railroad Company uses the passenger terminal for the operation of its passenger trains, **BUT SOUTHERN RAILWAY COMPANY HAS NEVER AVAILED ITSELF OF THE RIGHT TO USE THE SAID TERMINAL FACILITIES**

OR RAILROAD, AND HAS NEVER OPERATED ITS TRAINS OR ANY PORTION OF THEM INTO NEW ORLEANS, NONE OF ITS TRAINS BEING OPERATED TO POINTS NEARER THE CITY OF NEW ORLEANS THAN MERIDIAN, MISS., MOBILE, ALA., AND ATLANTA, GA."

The lease in question is in evidence and provides among other things (Tr., p. 223):

> "After the date hereof the Terminal Co. shall exclusively manage, operate and maintain every feature of the property of the Terminal Company, the common use of which is hereby granted to the lessees."

In this connection, note also the uncontradicted testimony of Mr. Larz A. Jones, a witness placed on the stand by Simon, on page 247, as follows:

> Q. The Southern Railway Company has never had any cars operated on the track of the Terminal Company?
>
> A. No.
>
> Q. You mean none of their own cars, is that what you mean?
>
> A. I mean none of their cars or their business as to the Southern Railway Company. The cars and business of its nominees have been operated over it.

Page 250:

> Q. Now, as a matter of fact, has the Southern Railway Company extended its railroad into the City of New Orleans or operated any of its trains into the City of New Orleans?
>
> A. It has not.

And note on page 248 the same witness' uncontradicted sworn statement that the **TERMINAL PROPERTY WAS NOT OPERATED AT ALL UNTIL 1905**, or one year after the supposed citation in the Simon suit.

IV b 4

TO SUMMARIZE.

The Southern Railway Company is a stockholder in the Terminal Company, a separate corporation, which began business in Louisiana a year after Simon's supposed citation. The Southern Railway Company has leased the right in the future to operate its trains in Louisiana, on a road not yet operative when Simon's supposed citation was served. The Southern Railway Company has never operated its trains, or any portion of them, into New Orleans, none of its trains being operated to points nearer to the City of New Orleans than Meridian, Miss., Mobile, Ala., and Atlanta, Ga. The Southern Railway solicits in Louisiana interstate commerce to be carried on by it in other States.

IV b. 5

LAW. GENERAL.

Is this doing business in the State?

We have little trouble in answering this question, as this Court has passed upon each phase of the situation

above developed and has in each case decided that it does not constitute doing business in the State in such a sense as to subject the foreign corporation to service of process in a personal action.

These decisions have gone back to the Hornbook Law in **Pennoyer vs. Neff, 95 U. S. 714,** have builded up from that recognized foundation stone of jurisprudence and have said in effect.

> "The principle of jurisprudence remains that a corporation cannot, any more than a natural person, be sued in an action in personam in a State within whose limits is has never been found. In such a case if a Court assumes jurisdiction and a personal judgment is rendered against the corporation, it is void for want of jurisdiction, etc.
>
> "This is an elementary principle supported by the decisions of the United States Supreme Court and of all the Courts of the country.
>
> "This distinction is clearly this. If a foreign corporation confines its operations to the State within which it was created, it cannot be sued in a State where it has no office and transacts no business, by serving process upon its president or other officer or agent, when accidentally present within such State.
>
> "Such officer or agent does not represent the corporation, nor carry with him his official or representative character into a State where the corporation has done no business and has not established an office."
>
> 107 Ill. App. 335; 29 Mich. 336 (2 N. W. 698); 77 S. W. 322; 59 Atlantic, 232; 196 U. S. 432; 33 Pac. 756; 141 Pa. State, 463; 31 Atlantic, 640; 290 U. S. 406; 110 Fed.

730; 256 U. S. 518; 106 U. S. 350; 130 Fed. 394; 130 Fed. 134. etc., etc.

"A personal judgment is without any validity if it be rendered by a State Court in an action upon a money demand against a non-resident of the State, who was served by a publication of summons, but upon whom no personal service of process within the State was made, and who did not appear.

98 U. S. 478; 101 U. S. 422; 106 U. S. 353; 107 U. S. 545; 137 U. S. 295; 156 U. S 521; 161 U. S. 646; 173 U. S. 224; 176 U. S. 402; 66 Fed. Rep. 637; 76 Fed. Rep. 211.

"The State having within her territory the property of a non-resident, may hold and appropriate it to satisfy the claims of her citizens against him; and her tribunals may inquire into his obligations to the extent necessary to control the disposition of that property. If he has no property within the State, there is nothing upon which her tribunals can adjudicate."

130 U. S. 564; 149 U. S. 209. 53 Fed. Rep. 967; 63 Fed. 785.

"Substituted service by publication or in any other authorized form is sufficient to inform a non-resident of the object of proceedings taken, where property is once brought under the control of the Court by a seizure or some equivalent act; but where the suit is brought to determine his personal rights and obligations; that is where it is merely in personam, such service upon him is ineffectual for any purpose."

98 U. S. 370; 110 U. S. 156; 115 U. S. 149; 134 U. S. 326; 172 U. S. 617; 176 U. S. 405; 49 Fed. Rep. 585; 95 Fed. 762.

"Process from the tribunals of one State cannot run into another State and summon a party there domiciled to respond to proceedings against him; any publication of process or of notice within the State in which the tribunal sits cannot create any greater obligation upon him to appear. Process sent to him out of the State and process published within it, are equally unavailing in proceedings to establish his personal liability."

144 U. S. 544; 147 U. S. 173; 169 U. S. 247; 173 U. S. 203.

"The term 'due process of law' when applied to judicial proceedings, means all cases of legal proceedings according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a competent tribunal to pass upon the subject matter; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or by his voluntary appearance."

101 U. S. 413; 129 U. S. 124; 133 U. S. 112; 148 U. S. 614; 154 U. S. 46; 154 U. S. 480.

Among the many acts not considered as doing business are the following:

"Selling of tickets by a Railroad Company."

Doty vs. R. R. 8 Abbott, Pr. N. Y. 427.

"The owning by a foreign corporation of shares of stock in domestic corporations and of interests in local limited partnerships." **Com. vs. Standard** Oil, 101- Pa. State, 119, "wherein it was held

that the ownership of shares of stock in Pennsylvania corporations and of the interests in Pennsylvania limited partnerships, doing business as aforesaid, and the producers of oil, as aforesaid, did not constitute doing business in that commonwealth, by a corporation chartered in Ohio."

Coming now to the particular facts here in issue, we find the jurisprudence to be as follows:

IV b. 6

LAW.

AGENT TO SOLICIT BUSINESS NOT DOING BUSINESS.

S 30

205 U. S., 230, **Green vs. C. B. & Q. R'y. Co.:**

"A Railroad Company which has no tracks within the district is not doing business therein in the sense that liability for service is incurred, because **it hires an office and employs an agent** for the merely incidental business of solicitation of freight and passenger traffic."

176 Fed., 1010, Fowkes vs. American Motor Co.:

127 Federal, 235, Earl vs. C. & O. Railway Co.:

"Where in an action in a Federal Court, sitting in Pennsylvania, against a foreign corporation, the statement of claim filed when the summons was issued described the defendant as a railway corporation of the State of Virginia, and neither such statement, the summons, the praecipe there-

for, nor the return, recited that the corporation was transacting business in Pennsylvania, a service made on the assistant secretary in Pennsylvania was insufficient to confer jurisdiction of the corporation.

"Defendant, a Virginia railroad company, neither owned nor operated any railroad located in Pennsylvania, and maintained no office in that State, though three directors and its assistant secretary resided there, who may at various times have received and given information indirectly affecting the corporation's business elsewhere. Defendant's cars, both freight and passenger, were transported through Pennsylvania by other railroads for the convenience of passengers and shippers; such railroad, however, paying for the use of the cars, and receiving the freight and passenger rates for that portion of the haul that was done in Pennsylvania. **Defendant was also a member of a Freight Transporting line which maintained an agency in Pennsylvania for the solicitation** of freight to be shipped under through bills of lading, each line receiving a proportionate share of the freight, and each contributing to the expense of the agency; and another railroad company located in Pennsylvania sold coupon tickets in connection with its own tickets, only good over defendant's road, accounting each month to defendant for its proportion of the proceeds. Held, that such facts did not justify a finding that defendant was doing business in Pennsylvana, so as to authorize it o be sued in that State."

At page 240, the Court said:

"The sale of tickets over the defendant's railroad by the Pennsylvania Company in Philadelphia is

only made in connection with the sale of the Pennsylvania Company's own tickets and is largely for the convenience of travelers. If this constitutes the transaction of corporate business in a State, it is possible that every important railroad company in the United States may be sued in this district, and in many other districts as well. Finally to maintain a freight soliciting agency in connection with other transportation companies has been decided not to subject the various companies to suit in the jurisdiction where the agency is maintained. Pennsylvania R. R. Co. vs. Rogers, 44 S. E., 300, 62 L. R. A., 178.

* * * * * * * * *

At page 241 the Court said:

"As was said in St. Louis Ins. Co. vs. R. R. Co. 104 U. S., 146:

" 'The arrangement in question was one simply for the convenience both of the shipper and the carrier.' and the Court decided that such an agreement does not make the companies partners."

34 Federal 286; Maxwell vs. At. & S. F. R. R. Co.

"In an action against a Railway Co. of another State, service of process cannot be made upon a passenger agent whose sole duty is to solicit travel for the defendant road, notwithstanding that he may have been employed to affect a compromsie of plaintiff's claim."

84 Federal 419. Union Associated Press vs. Times Star Co.

"A salaried agent of a non-resident newspaper corporation, empowered to solicit advertisements,

make contracts therefor, and receive payment, who carries on the business at an office having the name of the newspaper on its windows, is not a managing agent, through whom the corporation may be served under Code Cov. Proc. N. Y. Par. 432."

113 Federal 506, Weller vs. Pennsylvania R. R. Co.

"If I am mistaken in that, there are decisions made under the Act of 1887 which appear to me to be satisfactory, and they are to the effect that under that act an agent to solicit business within the district is not a representative of the corporation in the sense that he may receive service of process in the district. The cases are **N. K. Fairbanks & Co. vs. Cincinnati, N. O. & T. P. R'y Co., 4 C. C. A. 403, 54 Fed. 421, 38 L. R. A. 271,** which was folowed in **Wall vs. Railway, 37 C. C. A. 129, 95 Fed. 399.** These are decisions of the Circuit Court of Appeals of the Seventh Circuit. There is a Circuit Court decision to the same effect of earlier date. **Maxwell vs. R. R. Co., 34 Fed. 286.** In these cases, and in all, I think, that I have examined, the question considered was as to the character of the agent and the scope of his authority. Under the Act of Congress the question is whether the defendant has a regular established place of business without reference to the character of the agent who may be in charge. The question of the business done in the place, which may be regular and established, of course, is somewhat dependent upon the scope of authority of the man in charge of it, but not wholly so. A solicitor of business may not have an office at all. He may not need an office. Ordinarily, drummers of mer-

cantile houses do not have offices, and they are solicitors of business. Probably in the case of railroad companies, the maintenance of an office is more a matter of advertising than anything else. The company desires to be known to the public as one which is engaged in eastern States in the transportation business. Therefore, it sets up offices in various cities and towns of the country. But this is not significant of its intention to do business in a regular and established place in all of the cities and towns in which it may set up such offices."

215 U. S., 442, Mechanical Appliance Co. v. Castleman:

"In the Federal jurisdiction a foreign corporation can be served with process, under a State Statute, only when it is doing business therein."

Goldey v. The Morning News Co., 156 U. S., 518:

"Notwithstanding the Conformity Act, Par. 914, R. S., decisions and Statutes of other States are not conclusive upon Federal Courts in determining questions of jurisdiction. Even if by the law of the State the sheriff's return is conclusive and can not be attacked after removal into the Federal Court, that Court can determine whether the defendant was properly served; and if, as in this case, it appears that the corporation was not doing business in the State, the Court should dismiss the bill for want of jurisdiction for proper service." (Page 442.)

"In view of the principles thus determined, we think that the return of the sheriff in the State

Court was not conclusive upon the question of service. For, when the question was raised in the Circuit Court of the United States the jurisdiction of the Court would fall if it appeared that the corporation attempted to be served was not doing business in the State of Missouri and the attempted service was not upon one of its agents. **Conley vs. Matthison, 190 U. S., 406; St. Clair vs. Cox, 106 U. S., 350; Peterson vs. Chicago Rock Island & Pac. Railway, 205 U. S., 364; Green vs. C. B. & Q. Ry., 205 U. S., 530.**" (Page 443)

"Moreover, in cases which concern the jurisdiction of the Federal Courts notwithstanding the so-called Conformity Act, R. S., 914, **neither the Statutes of the States, nor the decisions of its Courts** are conclusive upon the Federal Courts. The ultimate determination of such questions of jurisdiction is for this Court alone. **Western Loan & Savings Co. vs. Mining Co., 210 U. S., 368, 369; Mexican Central Ry. Co. vs. Pinkney, 149 U. S., 194.**"

Allen vs. Yellowstone Park Transportation Co., 154 Fed., 507:

"Taking the whole record into consideration, it appears that the Chicago, Burlington & Quincy Railway Company sold tickets over its own line to the Yellowstone Park and then had coupons attached to those tickets that enabled the passengers to take a bus in the Yellowstone Park and go over the lines of the defendant. The real question is as to whether that fact being conceded, and supposing it to have been in the return made by the sheriff, would have been such service upon the

defendant so, as to bring it within the jurisdiction of this Court? **I think not.** In the case of **Green vs. The Chicago, Burlington & Quincy R. R., 205 U. S., 530,** the question here involved would seem to be settled against hte contentin of the plaintiff."

Maguire vs. The Great Northern R. R. Co., 155 Federal 231:

"A railroad company of another State neither owning nor operating a line of road in the State of Iowa cannot be brought within the jurisdiction of a State Court therein either under the rule of the National Acts or the Iowa Statutes relating to suits against foreign corporation by service made upon an employee, not a general agent, maintaining an office in that State for the purpose of soliciting business to be done outside of the State, where the cause of action has no connection with such office or agency."

Geopfert vs. Compagnie Generale Transatlantique, 156 Federal, 198:

"Defendant was a corporation of France, having its principal place of bbusiness in Paris and operating a line of passenger steamers between Havre and New York. It maintained a general agency in New York with a resident agent who represented it in the United States and Canada. It had numerous ticket agents throughout the United States who sold its tickets, among others a company in Philadelphia. Such company maintained offices in the principal cities of the United States

and Europe, and arranged tours and sold tickets over the principal railway and steamship lines of the world. It sold tickets over defendant's line, among others at its Philadelphia office, receiving a commission therefor, and also $600 a year on account of its office rent. It painted the defendant's name on its office door and also the names of other steamship and railway lines. Except for the sale of such tickets, no business was done on behalf of the defendant in the Eastern District of Pennsylvania. Held, that it was not doing business in the district in such sense that a Federal Court there obtained jurisdiction over it by service on the local agent."

West vs. The C. N. O. & T. P. Railway Co., 170 Fed. 355.

The Court quoted the **Burlington case, 205 U. S.**, and said:

"Defendant, an Ohio Railroad corporation, was sued in Georgia, on a transitory cause of action arising in Kentucky. Defendant had no tracks in Georgia and did no business in that State, except that it had a commercial agent, whose duty was to solicit freight and passenger business, without authority to issue bills of lading, sell passenger tickets, or make contracts. Held that defendant was not doing business in Georgia, so that service on such commercial agent would confer jurisdiction over the corporation so far as the Federal Courts were concerned, though the State Courts had decided the contrary." (Page 349.)

IV b. 7

THE OWNERSHIP OF STOCK IN THE TERMINAL COMPANY NOT DOING BUSINESS.

205 U. S. ~~341~~ 364, Peterson vs. C. R. I. & P. R. R. Co.:

The syllabus reads:

> "The ownership by a foreign railway company of a controlling interest in the stock of a domestic railway company which retains its own officers has property of its own and is responsible for its contracts and to persons with whom it deals does not make the foreign corporation liable to service of process within the State on the theory that it is doing business therein through the agency of the domestic corporation."

IV b. 8

LAW.

A SINGLE CONTRACT SUCH AS A SALE OR LEASE NOT DOING BUSINESS.

Hunter vs. The Insurance Co., 218 U. S., 573:

> "A few separate and disconnected transactions by a foreign corporation after its withdrawal from a State, all relating to matters existing before such withdrawal, do not constitute doing business in that State so as to preclude such corporation from revoking the power of attorney to accept process given by it to a State officer as required by Statute

of the State to enable it to enter and do business in the State."

Bruener vs. The Plow Company, 168 Federal 220:

"But there is no evidence in this record that the plaintiff ever did any other act in these territories than to make the sale and delivery of these goods and the attempt to collect their price, and the sale of goods in a State or Territory by a foreign corporation, by means of a solicitor the delivery of the merchandise therein, and the collection of the purchase price, do not constitute doing business or carrying on business within such a State or Territory within the meaning of Statutes prescribing conditions under which foreign corporations may do business therein." Citing ten lines of authorities.)

Metal Company vs. Mining Co., 152 Fed., 1008:

"The transaction of a single act of business in a State by a foreign corporation does not constitute the doing or carrying on of business therein."

See also **158 Fed., 702; 160 Fed., 570; 166 Fed., 342; 176 Fed., 1012; 113 U. S., 727; 47 Fed., 593; 183 Fed., 137.**

19 Cyc., 1268:

"The general conclusion of the Courts is that isolated transactions, commercial or otherwise, taking place between a foreign corporation domiciled in one State and citizens of another State, are not a doing or carrying on of business by the foreign corporation within the latter State, even, according to the weight of authority, where

the transaction is of such a character as to constitute a part of the ordinary business of the corporation.

"Illustration of isolated transactions:

" 'For a foreign company to make a purchase of real estate and hold or lease the same.' "

See also **Ib. Note 44**, as follows:

"**Louisville Company vs. Nashville, 84 S. W., 810: 'Purchase of real estate not doing business.'**

"**Wilson vs. Pearce, 85 S. W., 31, (Texas, 1905).**

'Ownership of land by a foreign corporation, leasing same on shares, and assignment of rent not doing business.' "

19 Cyc., 1309:

"Further than this, it is generally held that acquiring the title to real or personal property, and holding or transmitting the same, without more, is not the doing or transacting of business within the meaning of the Statutes imposing conditions or restrictions upon foreign corporations, and is not prohibited by such Statutes."

Quoting numerous cases and especially 95 Texas 252, and **29 Texas Cir. App., 571:**

"**100 Federal, 910, Empire Milling Co. vs. Tombstone**, a single contract made by a corporation owning mining ground in a territory, by which it employs and agrees to pay a second party to exploit and develop the property does not constitute a carrying on of business in the territory by the

corporation within the meaning of the Statute requiring foreign corporations carrying on business within the territory to file copies of their articles of incorporation and providing that every act uone by them prior to the filing thereof, shall be void. And such Statute does not affect the validity of the contract."

Gilchrist vs. Helena H. S. & S. R. Co., 47 Fed., 593:

"**Foreign Corporation's Right to do Business in a State.** Comp. St. Mont. 1888, Sec. 442, p. 720, requiring corporations before doing business in the State, to file in the office of the recorder of the county wherein it intends to carry on business, a copy of its charter, and certain verified statements as to its capital, does not prevent a foreign trust company which has not complied

therewith from purchasing securities of a railroad company in the State, and taking a mortgage upon its property to secure them, since such isolated act is not doing business in the State."

Cooper Mfg. Co. vs. Ferguson, 113 U. S., 727:

"A corporation organized under the laws of one State, does not, by doing a single act of business in another State, with no purpose of doing any other acts there, come within the provisions of a Statute of the latter forbidding foreign corporations to carry on business within it, except upon filing certificates showing their place or places of business, their agents and other matters required by the Statute."

See also **139 Fed., 96; 49 An., 390.**

For these reasons we submit, the Southern Railway must be held not to have been doing business in the State of Louisiana at the date of serving the alleged service of citation in 1904.

IV C.

IF ACT 54 OF 1904 AUTHORIZES THE SECRETARY OF STATE TO PLACE THE CITATION RECEIVED BY HIM IN A PIGEONHOLE AND GIVE THE DEFENDANT NO NOTICE OF THE SUIT, DOES IT NOT VIOLATE THE DUE PROCESS OF LAW CLAUSE OF THE CONSTITUTION?

The record shows that the course described in the heading was pursued in this case. The Assistant Secretary of State has stated over his own signature and without contradiction that on receipt of the process he "simply filed it." The judgment in question was rendered without notice or knowledge of any kind being communicated to the defendant. Such a procedure grates harshly upon ones sense of fairness and justice, and it is unthinkable that the constitutional guaranty of due process of law would permit such a hardship. That it does not do so the following language used in the following cases demonstrates:

234 U. S. 394, **Grannis vs. Ordean:**

> "The fundamental requisite of due process of law is the opportunity to be heard. **L. & N. R. R. vs. Schmidt, 117 U. S., 230; Semares vs. Craft, 182**

U. S. 427, and it is to this end, of course, that summons or equivalent notice is employed."

204 U. S., 17, Wayne vs. McDonough:

> "It is a rule as old as the law and never more respected than now, that no one shall be personally bound until he has had his day in Court, by which is meant until he is duly cited to appear and **has been afforded an opportunity to be heard.** Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression and never can be upheld where justice is justly administered.

Gouner vs. The Mo. Valley Bridge & Iron Co., 123 La., 964:

In this case the Supreme Court of Louisiana, was dealing with its own Statute, the Statute here under discussion, to-wit, Act 54 of 1904, and said:

> "This law makes no provision, whatever, for service on the defendant. The officer may decline to communicate with the person sued and give no notice, whatever, not even by mail. A judgment might be obtained without the least knowledge of the person sued. Under the phraseology of the Statute, the duty of the officer begins and ends in his office. **IF SUCH A JUDGMENT WERE RENDERED IT COULD RECEIVE NO RECOGNITION, WHATEVER, AT THE PLACE OF THE DOMICILE.'**

The Legislature of Louisiana recognized the correctness of the views thus stated and in 1914, by Act No. 267,

Section 26, it repealed Act 54 of 1904 and provided that in cases where service was made on the Secretary of State, it should be his duty

> "to send by registered mail addressed to the corporation at its last known domiciliary post office address, the originals of the papers served upon them, retaining in his office true copies thereof upon which he shall note the date, the manner and other particulars of the service and of the disposition of the originals."

We thus have both the Louisiana Legislature and the Louisiana Supreme Court recognizing the unconstitutionality of Act 54 of 1904.

Scott vs. McNeal, 154 U. S., p. 46:

> "No judgment of a Court is due process of law, if rendered without jurisdiction in the Court or without notice to the party."

Lafayette Ins. Co. vs. French, 18 Howard, 470:

> "A corporation created in Indiana can transact business in Ohio only with the consent, expressed or implied of the latter State. This consent may be accompanied by such conditions as Ohio may think fit to impose. And these conditions must be deemed valid and effectual for other States and by this Court, provided they are not repugnant to the Constitution or Laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, **or that principle of natural justice which forbids condemnation without opportunity for defense.**"

. Cox, 106 U. S., 356:

St. Cla State permits a foreign corporation to do
s within her limits and at the same time
's that in suits against it for business
bu one, process shall be served upon its agents,
pr vision is to be deemed a condition or per-
the • • • Such condition must not, how-
the ncroach upon that principle of natural
mi which requires notice of a suit to a party
eve he can be bound by it. It must be reason-
jus d the service provided for should be only
bef uch agents as may be properly deemed
abl ntatives of the foreign corporation. The
upo of this matter in **Lafayette Ins. Co. vs.**
rep to which we have already referred, sus-
deci these views."
Fre
tain

ochereau, 17 Wallace, 437. The point here
Lasere vdecided by this Court in **Dean vs. Nelson.**
involved waid:
It was the defendants in the proceeding (meaning
"inal proceedings) the appellee here, were
the the Confederate lines, at the time, and it
withlawful for them to cross those lines. Two
was had been expelled from the Union lines
of thtary authority and were not permitted to
by m The other, Benjamin May, had never left
retur federate lines. **A notice directed to them**
the Cblished in a newspaper, was a mere idle
and They could not lawfully see or obey it.
form hem, the proceeding were wholly void and
As to tive."
inope

211 U. S., 110, Twining vs. New Jersey:

> "Due process of law requires that the Court which assumes to determine the rights of parties shall have jurisdiction." **Pennoyer vs. Neff, 95 U. S., 714; Scott vs. McNeal, 154 U. S., 34; Old Wayne vs. McDonough, 204 U. S., 8.** "And that there shall be notice and opportunity for hearing given the parties. **Harvey vs. Elliott, 167 U. S., 409; Roller vs. Hally, 176 U. S., 398; Lindsey vs. Denver, 210 U. S., 373.**

32 Cyc., 460:

> "In order that jurisdiction may be obtained of a foreign corporation, it must have entered the State in which it is served for the purpose of carrying on its business there. And process must have been served upon an agent sustaining such a relation to it, that notice to the agent may well be deemed notice to the principal without **a violation of the principles of natural justice.**"

19 Cyc., 1328:

> "That principle is twofold, one that the foreign corporation must have entered the domestic State for the purpose of carrying on its business there, and second, that process must have been served upon an agent sustaining such a relation to it, that notice to the agent might well be deemed notice to the principal, **without a violation of the principles of natural justice.**" (Quoting numerous cases.)

On the authority of these decisions we respectfully submit that if the alleged service of process made in this

case was the service contemplated by Louisiana Act 54 of 1904, then Louisiana Act 54 of 1904 is unconstitutional because it contemplates the condemnation of a defendant without a hearing. Such a condemnation would be a denial of due process of law. A judgment rendered under such circumstances could, as the Louisiana Supreme Court has well said "receive no recognition whatever at the place of domicile." A defendant so condemned could legally invoke the jurisdiction of the Federal Court on grounds of diverse citizenship to enjoin his opponent from proceeding to seize his property under such a void judgment.

V.

THE ACCIDENT HAVING BEFALLEN IN ALABAMA AND THE DEFENDANT BEING DOMICILED IN VIRGINIA, THE LOUISIANA COURTS WERE WITHOUT JURISDICTION.

But there is a yet more serious proposition to be submitted. No note has yet been taken of the fact that this suit is brought by a citizen of Louisiana, against a corporation of Virginia, for reparation for injury sustained by breach of contract or a tort committed by that corporation in the State of Alabama.

Of course, even if the defendant in said cause were doing business in Louisiana, which is not the fact, and had an agent here duly authorized to receive service of process, it would not be subject to such suit in the Courts of

service co
not effect. It follows, necessarily, that substituted

In Old W not accomplish what actual service could
the Court

"A yne Mutual Life vs. McDonogh, 204 U. S., 8,
"ted and decided the point as follows:

nor atute of Pennsylvania provides:
it hat no insurance company not of this State,
this agent shall do business in this State, until
cate filed with the Insurance Commissioner of
proc tate a written stipulation, duly authenti-
sura by the company, agreeing that any legal
him s affecting the company, served on the In-
rece ce Commissioner, or the party designated by
hav or the agent specified by the company to
the e service of process for said company, shall
pan the same effect as if served personally on
Stat mpany, within this State, and if such com-
be s should cease to maintain such agent in this
" so designated such process may thereafter
poli rved on the Insurance Commissioner.
Pen n insurance company of Indiana issued a
of t y of insurance upon the life of a citizen of
was sylvania, the beneficiaries being also citizens
pan at commonwealth. The contract of insurance
loca made in Indiana without the insurance com-
Insu having filed the stipulation required by the
was Statute as to service of process upon the
Cou rance Commissioner of Pennsylvania. A suit
Cort brought on the contract in a Pennsylvania
agamissioner, process was served on the State Insurance
on tst the insurance company, and suit brought
pan at judgment in an Indiana Court. The Com-
did some business in Pennsylvania which had

no relation to the contract made in Indiana. Held that:

"'If the defendant had no such actual legal notice of the Pennsylvania suit as would bring it into Court, or if it did not voluntarily appear therein by an authorized representative, then the Pennsylvania Court was without jurisdiction to render a personal judgment against the company.'

"If the conclusiveness of a judgment or decree in a Court of one State is questioned in a Court of another, Government, Federal or State, it is open, under proper averments, to inquire whether the Court rendering the decree or judgment had jurisdiction to render it.

"Where an insurance company or corporation of one State goes into another State to transact business in defiance of its Statute as to service of process, it will, in an action against it in such State, be held to have assented to the terms prescribed by the local Statute for service of process in respect to business done in that State, but its assent in that regard will not be implied as to business not transacted in that State.

"If a personal judgment be rendered in one State against a corporation of another State bringing such corporation into Court, that is, without any legal notice to the latter of the suit, and without its having appeared therein in person or by attorney, or agent, it is void for want of due process of law. **164 Ind., 321**, reversed."

"The general rule, where it is not changed by Statute, is believed to be that foreign corporations are suable in the domestic tribunal upon any cause of action arising within the domestic jurisdiction and this is so, although the foreign corporation may have been unlawfully transacting business

within the State, since it cannot set up its own wrong in order to defeat the action."

49 Neb., 537; 68 N. W., 929; 3 Duer, N. Y., 648; 49 Fed., 910.

"A foreign corporation cannot be sued in the domestic tribunals, even though it may be doing business and may have appointed an agent in the State to receive service of process, for torts committed in a foreign State."

Central Ry. vs. Carr, 76 Ala., 388; 52 Am. Rep., 339; Robins vs. Oceanic, 112 N. Y., 315; 19 N. E. 625; 16 N. Y. Civ. Pro., 255; (2 L. R. A., 636); Osler vs Buffalo, 130 Fed, 1017.

"Thus it was held in **76 Alabama, 388**, that a passenger injured in his person while traveling in Georgia, on a railroad incorporated only in Georgia, although extended to and doing business in Alabama cannot maintain an action therefor in Alabama."

Newell vs. Great Western, 19 Mich, 336.

So that it is manifest that even if the Southern Railway were doing business in Louisiana, which was not a fact, it could only be sued in that State by substituted process upon causes of action arising out of that business and not such as might result from transactions in another State.

VI.

SIMON'S ASSIGNMENT VI.

This assignment sets up that complainant did not in its bill complain of the mode of service on it and that

therefore the findings of the master and of the Circuit Court of Appeal were **ultra petitionem.**

This statement is Simon pure error.

By turning to page 4 of the transcript at which the original bill is printed, we find a paragraph in that bill reading:

> "And your orator avers that the attempted service of said citation upon the Secretary or Assistant Secretary of State of Louisiana, was not a citation upon your orator, and is absolutely null and void for the purpose of bringing it under the jurisdiction of the said Civil District Court."

The quotation will, we believe, dispose of Assignment VI.

VII.

SIMON'S ASSIGNMENTS VIII, XVI AND XVII.

These assignments raise an old and oft-laid ghost. The burden of their complaint is that since the State Court decided the case it necessarily decided that it had jurisdiction, and that due process of law was allowed, and that decision is not reviewable here.

This Court has, on more than one occasion, pointed out the fallacy of the above contention, notably in the following cases:

234 U. S. 385, Granis vs. Odean:

> "This Court must exercise an independent judgment as to whether the process sanctioned by

the Court of last resort of the State constituted due process of law; it is not bound by nor can it merely accept the decision of the State Court on that question."

204 U. S. 15, Old Wayne Life Ass'n vs. McDonough:

"The plaintiff in error insists that the Pennsylvania Court had no jurisdiction to proceed against it; consequently the judgment it rendered was void for the want of the due process of law required by the Fourteenth Amendment. If the defendant had no such actual, legal notice of the Pennsylvania suit as would bring it into Court, or if it did not voluntarily appear therein by an authorized representative, then the Pennsylvania Court was without jurisdiction, and the conclusion just stated would follow, even if the judgment would be deemed conclusive in the courts of that Commonwealth. The constitutional requirement that full faith and credit shall be given in each State to the public acts, records and judicial pro- interpreted in connection with other provisions of interpreted in connection with other provisions of the Constitution, and therefore, no State can obtain in the tribunals of other jurisdictions full faith and credit for its judicial proceedings if they are wanting in the due process of law enjoined by the fundamental law. 'No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party.' **Scott vs. McNeal, 154 U. S., 34, 46.** No State can, by any tribunal or representative, render nugatory a provision of the supreme law. And if the conclusiveness of a judgment or decree in a Court of one State is questioned in a Court of another

government, Federal or State, it is open, under proper averments, to inquire whether the Court rendering the decree or judgments had jurisdiction to render it.

"Such is the settled doctrine of this Court. In the leading case of **Thompson vs. Whitman, 18 Wall, 457, 468**, the whole question was fully examined in the light of the authorities. Mr. Justice Bradley, speaking for the Court and delivering its unanimous judgment, stated the conclusion to be clear that the jurisdiction of a court rendering judgment in one State may be questioned in a collateral proceeding in another State, notwithstanding the averments in the record of the judgment itself. The Court, among other things, said that if it be once conceded that 'the validity of a judgment may be attacked collaterally by evidence showing that the Court had not jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can affect the right so to question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done, no statements contained therein have any force. **IF ANY SUCH STATEMENTS COULD BE USED TO PREVENT INQUIRY, A SLIGHT FORM OF WORDS MIGHT ALWAYS BE ADOPTED SO AS EFFECTUALLY TO NULLIFY THE RIGHT OF SUCH INQUIRY.** Recitals of this kind must be regarded like asservation of good faith in a deed, which avail nothing if the instrument is shown to be fraudulent.' This decision was in harmony with previous decisions. Chief Justice Marshall had long before observed in **Rose vs. Himely, 4 Cranch, 241, 269**, that upon principle the operation of every

judgment must depend upon the power of the court to render judgment. **In Williamson vs. Berry, 8 Howard, 495, 540,** it was said to be well settled that the jurisdiction of any court exercising authority over a subject 'may be inquired into in every other Court when the proceedings in the former are relied upon, and brought before the latter, by a party claiming the benefit of such proceedings,' and that the rule prevails 'whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court, or court of common law, or whether the point ruled has arisen under the laws of nations, the practice of chancery, or the municipal laws of States.' In his Commentaries on the Constitution, Story, referring to **Mills vs. Duryee, 7 Cranch, 481, 484,** and to the constitutional requirement as to the faith and credit to be given to the records and judicial proceedings of a State, said: 'But this does not prevent an inquiry into the jurisdiction of the Court in which the original judgment was given, to pronounce it; or the right of the State itself to exercise authority over the person or the subject-matter. The Constitution did not mean to confer (upon the States), a new power or jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within their territory.' In the later case of **Galpin vs. Page, 18 Wall, 350, 365, 366**—decided after, but the same term as **Thompson vs. Whitman**—the Court, after referring to the general rule as to the presumptions of jurisdiction in superior courts of general jurisdiction, said that such presumptions 'only arise with respect to jurisdictional facts concerning which the record is silent.' Presumptions are only indulged to supply the absence of evi-

dence or averments respecting the facts presumed. They have no place for consideration when the evidence is disclosed or the averment is made. When, therefore, the record states the evidence or makes an averment with reference to a jurisdictional fact it will be understood to speak the truth on that point, and it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred.' In the same case: 'It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in Court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression and can never be upheld where justice is justly administered.''

"In **Cole vs. Cunningham, 133 U. S., 112,** this Court, referring to the constitutional provision that full faith and credit should be given in each State to the public acts, records and judicial proceedings of every other State, said:

" 'This does not prevent an inquiry into the jurisdiction of the Court, in which a judgment is rendered, to pronounce its judgment, nor with the right of the State to exercise authority over the parties or the subject-matter, nor whether the judgment is founded in, and impeachable for, a manifest fraud.' "

In Scott vs. McNeal, 154 U. S. 45, it was held:

"Upon a writ of error to review the judgment of a higher Court of a State upon the ground that

the judgment was against a right claimed under the Constitution of the United States, this Court is no more bound by that Court's construction of a statute of a Territory, or of the State, when the question is whether the statute provided for the notice required to constitute due process of law when the question is whether the statute created a contract which has been impaired by a subsequent law of the State, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another State. In every such case, the Court must decide for itself the true construction of the statute. (**Huntington vs. Attrill, 146 U. S., 657, 683, 684; Mobile and Ohio R. R. vs. Tennessee, 153 U. S., 486, 492, 495**). 'No judgment of a court is due process of law if rendered without jurisdiction in the Court, or without notice to the party.' " (p. 46).

175 F., 669, Michigan Trust Co. vs. Ferry:

"State laws and decisions cannot determine for the National Courts what constitutes sufficient process of law or sufficient appearance of the parties, but it is their duty to exercise their independent judgment in deciding these questions notwithstanding the full faith and credit provision of the Constitution.

VIII.

SIMON'S ASSIGNMENT XIII.

This assignment reads:

"'That the Circuit Court of Appeals erred in maintaining complainant's bill and in perpetuating

the injunction herein, because a Court of Equity, State or Federal, is without power by its writ of injunction to enjoin a judgment of a Court of concurrent jurisdiction merely because said Court differed in its interpretation of a statute of a State; in this case, in the interpretation as to the mode of service of process, namely, whether the service under Act 54 of 1904, of the State of Louisiana, was made upon the Secretary of State, or his assistant, purely a legal question."

This assignment is apparently a typographical or other error.

No question as to whether the service was made upon the Secretary of State or his assistant was ever raised in this case in the State Court. The Sheriff's return on the alleged citation is in the record at page 15, and reads:

> "Received a certified copy of the within citation and petition on the third day of December, 1904, and on the third day of December, 1904, I served said copies on the within named Southern Railway Co., in the Parish of E. Baton Rouge, State of Louisiana, by personal service on E. J. McGivney, Asst. Secy. of State, John T. Michel, Secretary of State, being absent at the time of service."
>
> (Signed) W. J. MILLIGAN, Deputy.

There is no other evidence on the subject in the record and it was conceded at the bar of the Circuit Court of Appeals, that the service was made on the Assistant Secretary of State as set forth in the foregoing return.

There is, therefore, no such question here involved as the question whether service was made upon the Secretary of State or his assistant.

IX.

FRAUD.

This record shows that Simon was a passenger on a Southern Railway train on February 8, 1904. What happened to him is thus described by **Dr. E. Denegre Martin** at transcript, page 179:

> Q. On or about March, 1904, do you recall having made a visit to **E. Simon**, the defendant in this case?
>
> A. Yes, sir.
>
> Q. Did you, at that time, make any physical examination of him?
>
> A. Yes, sir; I examined both feet and found a swelling of both ankles.
>
> Q. What was the extent of that swelling?
>
> A. The swelling was not very extensive, simply apparent and showed that the party had sustained some injury.
>
> Q. Did he state to you how he had been injured?
>
> A. His statement to me was that while in a train on the Southern Railway he was sitting on one of the seats with his feet on and against the back of the opposite seat when the car same [came] to a sudden stop and threw him with force forward injuring his ankles.
>
> Q. Did he state what kind of a car he was in whether a sleeping car or a day coach?
>
> A. I don't recall that fact.

Q. It is averred in the original petition by Mr. Simon that the ligaments of his leg were lacerated and torn. Is that true or not?

A. **That was not my finding.**

Q. If that had been the fact, could you have found it?

A. Yes, sir.

Q. As a matter of fact, were the ligaments of his leg lacerated and torn?

A. **They were not and could not have been from the nature of the accident.**

Q. Did you make a subsequent examination after the 4th of March?

A. Yes, sir; I saw him subsequently; I don't remember the exact date. He was then in a fair condition and walked around the store; at that time the injury was not apparent, but he stated that he still suffered from his injuries.

Q. How long was that after the first visit?

A. About two weeks, I think.

Q. Did you again see him later?

A. I don't recall any other visit.

Q. He has averred that his injuries were of a serious nature and sufficient to cripple him. What do you say as to the averment that his injuries were permanent?

A. That was not my opinion at the time nor did I think so from my examination.

Q. Where was Mr. Simon when you made the visit in March, 1904?

A. In his place of business on Chartres Street. I don't remember the number but it was opposite the new Court House.

After the accident, Simon was offered $350.00 in full settlement. His counsel offered to accept $5000.00 in full

settlement. This offer the Southern Railway Company considered absolutely out of the question and declined. The matter was left open for future adjustment.

This record shows that, under the foregoing circumstances, Simon caused a so-called citation to issue and to be served upon the Assistant Secretary of the State of Louisiana (not the Secretary of the State of Louisiana, as required by the statute). That without any inquiry as to whether the defendant had any actual notice of the suit (Tr., p. 30), but being informed that this defendant had made no appearance, he took a default judgment against it for the grossly exaggerated sum of $13,348.00.

That in taking the said judgment he went out of his way to see that no record of the evidence adduced was made, in this respect breaking an invariable custom of the trial court (Tr., p. 66), and that in addition to this, although the case might have been submitted to the judge, it was submitted to a jury (Tr., p. 66).

These actions, as it seems to us, show quite clearly that Simon was undertaking by unfair means amounting to fraud to secure an undue advantage of the absent defendant.

Let us review them:

The special master said on this subject (Tr., p. 173): That the testimony was not reduced to writing may permit criticisms and suspicions, especially when considered in reference to so large a claim, partly made up of items of doubtful right of recovery, but it does not in itself justify a conclusion of wrongdoing.

The depositions of Kennedy, at page 59, show that on March 3rd, 1904, Simon's representative, after discussing a settlement of the claim on a basis of $300.00, left him (Kennedy) with the impression that Simon would make an offer. Simon leaves or creates that impression on the minds of the Southern Railway officials, takes no action from April until December, and then, in December, goes into a Court in a State remote from the domicile of the Southern Railway, a State in which the Southern Railway Company is not doing business, a State in which it has no representative authorized to receive service of process, a State in which it has no reason to believe that a suit will be brought against it, and serves a so-called citation on the Assistant Secretary of State, who, in accordance with standing instructions received by him from the Attorney General of the State, pigeonholes the citation and gives absolutely no notice thereof to the Southern Railway Co.

Before bringing this suit, Simon wrote no letter to the Southern Railway Co., nor to any of its officials, and gave no notice of any kind to them of his intention of bringing a suit. He was evidently aware that they had no notice of the suit. With this information in his possession, instead of attempting to afford them some fair day in Court, he, on the contrary, ordered the testimony which his witnesses gave not transcribed, and in order to be sure to get a judgment for those items in his petition which show on their face that they are gross exaggerations, he impanelled a jury, well knowing the disposition of juries towards corporations, when he might have submitted the matter to a Judge.

He submitted to that jury a petition which contains, as the record shows, at least three false statements, as follows:

First—His petition avers (Tr., p. 12), that the ligaments of his legs were lacerated and torn so as to prevent the use of his limbs in locomotion.

Dr. E. D. Martin, an eminent physician of New Orleans, testified on page 179 of the transcript, without contradiction, as follows:

Q. It is averred in the original petition, by Mr. Simon, that the ligaments of his legs were lacerated and torn. Is that true or not?

A. That was not my finding.

Q. If that had been the fact, could you have found it?

A. Yes, sir.

Q. As a matter of fact, were the ligaments of his legs lacerated and torn?

A. They were not and could not have been from the nature of the accident.

The petition avers (on page 8 of the transcript), that the accident happened on Feb. 8th, 1904.

"That he, petitioner, was confined to his room for a period of two months, receiving constant professional medical attention and treatment."

Schumate and Martin both swear, without contradiction, in this record, that they interviewed Simon in March. Schumate fixes the date as March 3rd., and states that he (Simon) was, at that time, in his store,

attending to his business. The statement in the petition that he was confined to his room for two months is thus shown to be false.

Simon's petition avers that during a period of two months he was prevented from giving his personal attention to his business. The testimony of Dr. Martin and Schumate, above referred to, shows that he was attending to his business within less than thirty days after the alleged accident. How much earlier he began to attend to his business we are left to conjecture, in the absence of any testimony on the subject by Simon himself.

All these facts will, we submit, lead the Court to the inevitable conclusion that Simon deliberately lulled to sleep any suspicion of the Southern Railway Co. of his intent to sue and then proceeded in a far distant and out of the way tribunal to obtain upon false allegations and excessive and entirely unwarranted judgment. Said excessive judgment being obtained solely because the Southern Railway Co. had no knowledge or information of the filing of the suit wherein the judgment was obtained.

Respectfully submitted,

J. BLANC MONROE,
MONTE M. LEMANN,
Solicitors for Appellee.

ALFRED P. THOM,
Of Counsel.

New Orleans, October, 191-

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 34.

EPHRAIM SIMON, APPELLANT,

vs.

SOUTHERN RAILWAY CO., APPELLEE.

APPEAL FROM UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

REJOINDER OF APPELLEE.

If the court please:

We feel it to be a duty which we owe not only to the court but to ourselves to point out certain of the errors into which the reply brief of appellant has fallen.

"A."

We claim that Simon's injury was inconsiderable (Original Brief, p. 8).

Simon claims that (Reply Brief, p. 9; Rec., p. 12) "your petitioner's ankles were severely sprained and the ligaments of his legs lacerated and torn."

Dr. E. D. Martin, a prominent physician in New Orleans, employed especially to make an examination of Simon, swears (Rec., p. 79):

> "Q. Did you at that time make any physical examination of him (Simon)?
> "A. Yes, sir, I examined both feet and found a swelling of both ankles.
> "Q. What was the extent of the swelling?
> "A. The swelling was not very extensive, simply apparent and showed that the party had sustained some injury. * * *
> "Q. As a matter of fact were the ligaments of his leg lacerated and torn?
> "A. They were not, and could not have been from the nature of the accident."

Nor does Dr. Gaudet, Simon's physician, make any attempt to support the claim made by Simon that "the ligaments of his legs were lacerated and torn." He contents himself (Rec., p. 49) with the vague and general statement that Simon's injuries were serious.

"B."

Simon Originally Claimed $5,000.

This statement is based on the affidavit of Walter Kennedy, which is in evidence at Record page 60, in accordance with the agreement at Record page 243, which reads in part as follows:

> "The said Henry L. Lazarus, after discussing the matter of Simon's claim for injuries as his counsel, made a proposition to me for a settlement of the claim of $5,000. This proposition I rejected stating to him that the railway company would not be willing to consider the settlement of this claim for such an amount."

Dr. E. D. Martin (Rec., p. 181) swore:

> "Q. What was said by either Mr. Kennedy or Judge Lazarus as to the amount of the settlement?
> "A. I do not recall exactly what was said in regard to the settlement but my impression is that Judge Lazarus was willing to accept the settlement of $5,000."

"C."

Failure to Transcribe Testimony Stenographically.

This statement is based on the statement of Mr. Harry H. Hall in the Record, at page 66, which reads:

> "Affiant further deposes and says that the testimony in support of said verdict of said civil district court was, as affiant was informed and verily believes, not reduced to writing by reason (of) which intentional omission no relief could be had by appealing from this judgment to the Supreme Court of Louisiana."

This statement is repeated by Mr. Hall at Record page 188, where he says:

> "The testimony had not been reduced to writing. There was, therefore, no evidence in the record which would justify defendant in taking an appeal. As I stated that the testimony of the witnesses had not been reduced to writing."

Curiously enough in attempting to controvert our claim that by failing to have the testimony taken down stenographically Simon took an unconscionable advantage of his adversary, counsel quotes the following language used by the Supreme Court of Louisiana in Simon *vs.* Howard, 23d La. Ann., 504:

> "We find no evidence in the record. In such a case we will presume that the court *a qua* in rendering judgment proceeded on proper evidence."

Our contention is that Simon had this decision in mind when he failed to have the testimony taken down stenographically.

Simon then proceeds to quote law to the effect that a litigant has a "legal" right to pursue this course. Our contention is that, under the circumstances of this case, the pursuit of such a course, whether legal or illegal, in a strict sense, was taking an unconscionable advantage of the "absent and unrepresented" defendant.

Other Errors in Simon's Brief.

(A.) At page 15 Simon's reply brief states:

> "Andrews, the ticket agent of the Southern Railway Company, sold and delivered tickets, not only over lines connected with the Southern Railway Company, but sold and delivered tickets (independently of connecting carriers) over the independent lines of the Southern Railway Company" (Rec., pp. 206-252).

A reference to the pages quoted will convince Your Honors that this statement is an error. A reference to our original brief at page 72 will give the testimony on the subject which is there quoted at some length.

Mr. Andrews there swears that "All the tickets sold by him are furnished by the Louisville & Nashville R. R. Company," etc.—*i. e.*, are tickets for continuous interstate traffic originating on the L. & N., and in many instances proceeding on to the Southern, but always reaching the Southern at points without the State of Louisiana.

(B.) At page 15 of his reply brief, Simon's counsel refers to Simon's affidavit as showing that Mr. Graham, the soliciting freight agent of the Southern Railway, made contract in the city of New Orleans on behalf of that company. We have already refuted this contention in our original brief, at page 75, and respectfully refer the court thereto.

We are a little surprised, however, to find at page 16 that Simon is contending that the documents copied in the transcript at pages 263 to 269 are claimed to be "bills of lading" of the Southern Railway Company issued in New Orleans. The documents do not in any way resemble a railroad bill of lading, and the only reason we refer to them at all is because as copied in the transcript they appear to have the words "Southern Railway" printed on them. In the circuit court the originals of these documents were on hand, and no confusion arose. In the Circuit Court of Appeals we had the clerk of the circuit court send up for inspection one of the original documents. They are nothing more nor less than dray tickets, on which Simon, by the way of routing instructions, caused the words "Southern Railway" to be placed. Our recollection is—although we are not entirely positive on the point—that the words "Southern Railway" are written in lead pencil, and that the words "Received in good order from E. Simon, manufacturer of ladies' shirts, underwear, and boys' waists, 416 Chartres street, between St. Louis and Conti," are printed. The documents were not issued by the Southern Railway, nor was the signature E. A. Bynum, agent, appended by a representative of the Southern Railway, and no one is more familiar with that fact than Simon. If there be any doubt in this court's mind on the subject, we earnestly urge that the production of the original documents or photographs thereof be ordered. A single glance will reveal their true nature.

(C.) On page 31 of his reply brief, Simon's counsel says:

> "* * * it is admitted by the president of the Southern Railway that Mr. Andrews sells tickets to purchasers in the city of New Orleans for passage not only through connecting carriers, but directly over the lines of the Southern Railway in other States (R., p. 206), and receives money therefor, and places it in bank for account of Southern Railway Company (R., p. 269), and likewise Graham, the freight agent, through Mr. Bynum, issues bills of lading or receipts

for transportation of freight over the lines of the Southern Railway" (R., p. 263, *et seq.*).

As a matter of fact, Mr. W. W. Finley, the president of the Southern Railway, testified to just the reverse. His testimony is to be found on pages 205 and 206 of the record, and reads in part as follows:

> "It is not a fact that the Southern Railway maintains for the transaction of its business in the city of New Orleans two offices, one under the jurisdiction of J. C. Andrews, its authorized representative and agent for the transaction of passenger business, and the other under the direction of James B. Graham, its freight agent for the transaction of its freight business, with authority to issue bills of lading for freight received at this end and to be shipped over its lines and connecting carriers thereof, and to make freight rates for the shipment in New Orleans of freight of every character for the Southern Railway through its connecting carriers into the city of New Orleans.
>
> "Southern Railway does employ the gentleman named as stated in my direct examination only for the purpose of soliciting traffic and for the performance of the duties in connection with the solicitation of traffic to be routed via the lines of the Southern Railway Company. They have no authority whatever to issue and do not issue bills of lading and they have no authority to make and do not make rates. They have on file and publish rates for the information of the public, but they have nothing to do with the making of them."

The check referred to is a check given long after the alleged service of process in this case to Mr. Andrews and shows by its endorsement that it was given as the "price of a ticket N. O. to Washington and N. Y.," *i. e.*, a ticket sold by Andrews in strict accordance with his testimony (Rec., p. 64), being over the L. & N. R. R. to Atlanta and thence to New York, and being furnished him by the L. & N. R. R. Company for that purpose.

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Appellant is between the horns of a dilemma. If he concedes that the unconstitutionality of act 54 of 1904 was set up, his ponderous argument at 35 *et seq.* falls. If he denies that constitutional questions were raised, and if the court agrees with him, then he must go out of court here, as the judgment of the Circuit Court of Appeals would be final.

The Action of Nullity is a Separate, Distinct Suit under Louisiana Law.

The following articles of the Louisiana Code of Practice are in point:

C. P., 604:

One may demand the nullity of a judgment for any of the causes provided in this section, even if no appeal have been taken from the same, or if the delay for taking same have expired.

C. P., 610:

The party praying for the nullity of a judgment before the court which has rendered the same must bring his action by means of a petition; and the adverse party must be cited to appear as in ordinary suits.

C. P., 611:

Though there has been no appeal within the delay prescribed by law, the nullity of the judgment may yet be demanded by means of an action brought before the court which has rendered the same, within the delay hereafter provided.

C. P., 612:

The nullity of a judgment rendered against a party without his having been cited or by an incompetent judge, even if all the formalities of the law have been observed, may be

demanded at any time, unless the defendant were present in the parish and yet suffered the judgment to be executed without opposing the same.

30 La. Ann., 144, Woolfolk *vs.* Woolfolk:

This was a suit brought in a Louisiana state court to annul a judgment of that court. The suit was styled an intervention and was engrafted onto the old proceedings instead of being instituted as a new and separate suit. The court said:

> "A suit for the nullity of a judgment cannot be brought by way of intervention or third opposition. It must be brought in the ordinary form, by petition and citation."

And the so-called interventions were dismissed as in case of nonsuit.

Respectfully submitted,

J. BLANC MONROE,
MONTE M. LEMANN,
Solicitors for Appellee.

ALFRED P. THOM,
Of Counsel.

SIMON *v.* SOUTHERN RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 34. Argued November 2, 3, 1914.—Decided January 25, 1915.

United States courts by virtue of their general equity powers have jurisdiction to enjoin the enforcement of a judgment obtained by fraud or without service.

In the absence of service of process, a person named as defendant can no more be regarded as a party than any other member of the community.

A judgment against a person on whom no process has been served is not erroneous and voidable, but, upon principles of natural justice, and also under the due process clause of the Fourteenth Amendment, is absolutely void.

Jurisdiction of the United States courts cannot be lessened or increased by state statutes regulating venue or establishing rules of procedure.

While § 720, Rev. Stat., prohibits United States courts from staying proceedings in a state court, it does not prevent them from depriving a party of the fruits of a fraudulent judgment, nor from enjoining a party from using that which he calls a judgment but which is, in

fact and in law, a mere nullity and absolutely void for lack of service of process. *Marshall* v. *Holmes*, 141 U. S. 589.

This rule obtains whether the case was one removed from the state court to, or originally commenced in, the Federal court.

The broader the ground of a decision, the more likelihood there is of affecting interests of persons not before the court, and, therefore, this court refrains from passing upon propositions not necessary to the decision of the case although passed upon by the courts below.

Quære, whether the acts of the foreign corporation against whom judgment was entered amounted to doing business within the State.

Quære, whether, under the statute of Louisiana providing for service of process on foreign corporations doing business within the State, but who have not appointed an agent therein, by service upon the Secretary of State, service upon the Assistant Secretary is sufficient in the absence of the Secretary.

Quære, whether the state court has jurisdiction of a suit on a transitory cause of action against a foreign corporation arising in another State, based on service of process on an agent voluntarily appointed by such corporation.

A State may by statute require a foreign corporation doing business therein to designate agents upon whom service may be made, or in default of its so doing, to provide upon whom such service may be made in suits relating to business transacted therein, but such statutory requirements cannot extend to causes of action arising in other States.

Service of process, in a suit against a foreign corporation who has not appointed a resident agent, upon the Secretary of State under the Louisiana statute providing for such service is not sufficient to give the court jurisdiction of a suit based on a cause of action arising in another State, and judgment entered thereon by default is absolutely void, and enforcement thereof, other jurisdictional facts existing, can be enjoined by the Federal court.

195 Fed. Rep. 56, affirmed.

THIS appeal raises a question of the power of a United States court to enjoin the appellant, Ephraim Simon, from enforcing a judgment alleged to have been fraudulently obtained by him in a state court, in a suit against the Southern Railway. The Company had no notice that the suit had been brought,—other than that arising from the service which purported to have been made in pursuance of the Louisiana Act No. 54, which provides (§ 1) that it shall

be the duty of every foreign corporation doing any business in this State to file a written declaration setting forth the places in the State where it is doing business, and the name of its "agents in this State upon whom process may be served."

"Section 2.—Whenever any such corporation shall do any business of any nature whatever in this State without having complied with the requirements of Sec. 1 of this act, it may be sued for any legal cause of action in any Parish of the State where it may do business, and such service of process in such suit may be made upon the Secretary of State the same and with the same validity as if such corporation had been personally served."

Availing himself of the provisions of this statute, Ephraim Simon, on December 1, 1904, brought suit, in the Civil District Court for the Parish of Orleans, against the Southern Railway Company averring that the defendant was a Virginia corporation "doing business in the city of New Orleans." The petition alleged that Simon, a New Orleans merchant and manufacturer, purchased, on February 8, 1904, a ticket from Selma, Alabama, to Meridian, Mississippi, and while riding over its lines through the negligence of defendant a collision occurred in which were inflicted upon him great personal injuries and financial loss. The petitioner claimed as damages $5,000 for personal injury; $340 for medical expenses; $4,000 for loss of profit that he would have earned; $3,000 for deterioration in the stock while he was confined to his bed and unable to sell, and $1,000 for increased cost of manufacture due to his absence from business.

There was a prayer that the Company be cited to appear and answer, and "it having failed to comply with the provisions of Section One of Act No. 54 of the Session of 1904, the service of process in this suit be made upon Hon. John T. Michel, Secretary of State, said service, so made, to be a service upon the said Southern Railway

Company, as provided for in the act aforesaid." The plaintiff asked for judgment for $13,348.

The summons was directed to "the Southern Railway Company, through Hon. John T. Michel, Secretary of State of Louisiana, New Orleans," and required the defendant to answer within ten days after service. The Deputy Sheriff on December 3, 1904, made return that he had served the citation and petition "on the within named Southern Railway Co. in the Parish of East Baton Rouge, State of Louisiana, by personal service on E. J. McGivney, Ass't Sec'y of State, Jno. T. Michel, Sec'y of State being absent at the time of service." The Assistant Secretary of State, acting under the instructions of the Attorney General, filed the citation and petition in his office.

No notice, however, was given to the Southern Railway of the service of the citation or of the fact that suit had been brought. It therefore made no appearance in the suit brought against it by Simon, and, on January 10, 1905, the court, on motion of the plaintiff, ordered that judgment by default be entered against the Railway Company. Under the Louisiana practice, the case was thereafter submitted to a "trial by jury on confirmation of default." The plaintiff himself testified and other witnesses were examined and on January 16 the jury returned a verdict in favor of the plaintiff for $13,348—being the exact amount claimed in the petition. On January 20 the court considering "the verdict of the jury in this matter, and that the demand of the plaintiff was proved, and the law and the evidence being in favor of said plaintiff" entered judgment on the verdict.

Thereafter the Company learned of the existence of the judgment and averring itself to be a citizen of Virginia, filed (February 6, 1905) in the United States Circuit Court for the District of Louisiana a bill against Simon, a citizen of Louisiana, asking that he be perpetually enjoined from enforcing the same.

The Bill attached, as an Exhibit, a copy of the record in the state court and alleged that, in the collision referred to, Simon had received injuries which a surgeon had reported were slight; that the Company had offered him $350 in settlement. Simon refused to accept this sum but considered and discussed the acceptance of $750, which, however, was not agreed to by the defendant; the matter was temporarily left in abeyance, it being understood that negotiations were still pending and would probably result in an agreement of settlement. It was alleged that thereafter the plaintiff surreptitiously and without the knowledge of the Railway Company entered suit for $13,348, "falsely and fraudulently pretending that he had been injured in that sum"; that Simon's personal injuries were slight as shown by the report of the surgeon; that the claim for loss of profit on stock and the extra cost of manufacturing stock were claims that he well knew were fraudulent, fictitious and utterly untrue; but by false testimony he secured a verdict therefor.

The bill further alleged that the Southern Railway was not doing business in the State of Louisiana; that the service upon the Secretary or Assistant Secretary of State was not a citation upon the Railway Company and was null and void for the purpose of bringing it under the jurisdiction of the Civil District Court; that any judgment rendered upon such attempted "citation would be, if rendered without appearance of the defendant, a judgment without due process of law, and consequently, in violation of the Constitution;" that the Railway Company had never received the citation issued in the suit, nor was it advised, nor had it any knowledge of the pendency of said proceedings until after the rendition of the judgment; that the verdict of the jury having been rendered upon false testimony and without notice, it would be against good conscience to allow the judgment thereon to be enforced against the Railway Company, which has

no remedy at law in the premises and has a complete meritorious defense to the claim on which the judgment is based; that by fraud and accident, unmixed with its own negligence, the Railway Company has been prevented from making such defense.

As stated in *Ex parte Simon*, 208 U. S. 144, on another branch of this case, 'The bill further alleges that Simon will attempt to collect the fraudulent judgment by *fieri facias*, and prays as specific relief an injunction against his further proceeding under the same. A preliminary injunction was issued, after a hearing on affidavits, on June 30, 1905, and Simon appears to have obeyed the order for over two years. A demurrer to the bill was overruled in December, 1906, and a plea to the jurisdiction, filed in February, 1907, was overruled in the following May. Simon answered in August and issue was joined in the same month. Notwithstanding the injunction Simon, in contempt therefor, obtained a writ of *fieri facias* and directed a levy and the service of garnishment process to collect the judgment. . . . The punishment was a small fine, and the imprisonment was ordered until the fine was paid.'

In *habeas corpus* proceedings instituted in this court he sought to be discharged from the sentence of imprisonment imposed in the contempt case, claiming that, under Revised Statutes 720, the Circuit Court was without jurisdiction to grant the injunction and therefore the order in the contempt proceedings was absolutely void. The writ was denied.

After this court refused to grant the writ of *habeas corpus* the case, on the main bill, was referred to a Master to hear evidence and to report his conclusions of law and facts. He found that the Railway was not doing business in Louisiana in the sense of the statute; that the judgment was not fraudulent, but held it to be void because service upon the *Assistant* Secretary of State was not

the "service upon the Secretary of State" required by the statute.

The Circuit Court did not consider the question of fraud, but held (184 Fed. Rep. 959) that the state judgment was void because the Louisiana statute providing for service on foreign corporations was unconstitutional. It thereupon entered a permanent injunction against Simon as prayed for in the bill. From that decree Simon appealed making many assignments of error, attacking the jurisdiction of the court to entertain the bill and especially denying its power to grant the relief prayed for in view of the provisions of § 720 of the Revised Statutes. The Circuit Court of Appeals held (195 Fed. Rep. 56) that it had been authoritatively decided in *Ex parte Simon*, 208 U. S. 144, that the Circuit Court had jurisdiction. It found that the Railway Company was doing business in New Orleans; but ruled that Act 54 did not provide for service on the Assistant Secretary of State and hence that the judgment by default in the state court was void for want of jurisdiction of the person of the defendant. The decree of the Circuit Court was affirmed and thereupon Simon prosecuted the present appeal.

Mr. Henry L. Lazarus, with whom *Mr. Herman Michel*, *Mr. Eldon S. Lazarus*, *Mr. David Sessler* and *Mr. Girault Farrar* were on the brief, for appellant.

Mr. J. Blanc Monroe, with whom *Mr. Monte M. Lemann* and *Mr. Alfred P. Thom* were on the brief, for appellee.

MR. JUSTICE LAMAR, after making the foregoing statement, delivered the opinion of the court.

The primary question whether the United States court had jurisdiction of the case must of course be determined by considering the allegations of the Bill. It shows

diversity of citizenship and charges that Simon was seeking to enforce by levy a judgment obtained by fraud and without notice to the Railway Company. If that be so the United States courts, by virtue of their general equity powers, had jurisdiction to enjoin the plaintiff from enforcing a judgment thus doubly void. For even where there has been process and service, if the court "finds that the parties have been guilty of fraud in obtaining a judgment . . . it will deprive them of the benefit of it." *McDaniel* v. *Traylor*, 196 U. S. 415, 423. Much more so will equity enjoin parties from enforcing those obtained without service. For in such a case the person named as defendant "can no more be regarded as a party than any other member of the community." Such judgments are not erroneous and not voidable but upon principles of natural justice, and under the due process clause of the Fourteenth Amendment, are absolutely void. They constitute no justification to a plaintiff who if concerned in executing such judgments is considered in law as a mere trespasser. *Harris* v. *Hardeman*, 14 How. 339 (default judgment entered on improper service). *Williamson* v. *Berry*, 8 How. 541; *Scott* v. *McNeal*, 154 U. S. 46; *Western Indemnity Co.* v. *Rupp*, 235 U. S. 273.

On principle and authority, therefore, a judgment, obtained in a suit of which the defendant had no notice, was a nullity and the party against whom it was obtained was entitled to relief. It serves to illustrate the existence of appellee's right and the method of its enforcement to note that under the law of Louisiana the Railway Company was not obliged to attack a void judgment in the court that rendered it—but, in a court having jurisdiction of the plaintiff's person, could have instituted a new and independent proceeding to enjoin Simon from enforcing it. See *Sheriff* v. *Judge*, 46 La. Ann. 29, where a suit was brought in the 21st District Court to enjoin the enforcement of a void judgment obtained in the 17th District

Court. See also *Hibernia Bank* v. *Standard Guana Co.*, 51 La. Ann. 1321. Of course, the jurisdiction of the United States courts could not be lessened or increased by state statutes regulating venue or establishing rules of procedure. But, manifestly, if a new and independent suit could have been brought in a state court to enjoin Simon from enforcing this judgment, a like new and independent suit could have been brought for a like purpose in a Federal court, which was then bound to act within its jurisdiction and afford redress (*Hyde* v. *Stone*, 20 How. 175; *Reagan* v. *Farmers' Trust Co.*, 154 U. S. 391; *Payne* v. *Hook*, 7 Wall. 429). The United States courts could not stay original or supplementary proceedings in a state court (*Mutual Reserve* v. *Phelps*, 190 U. S. 159); or revise its judgment. But by virtue of their general equity jurisdiction they could enjoin a party from enforcing a void judgment.

2. The Appellant, Simon, however, contends that even if there was equity in the bill; and even if the Railway Company could have brought a new and independent suit in the state court to enjoin him from using the judgment,—yet in the present case the Federal court was without power to afford the same relief because § 720 of the Revised Statutes provides that, except in bankruptcy cases, a United States court shall not "stay proceedings in any court of a State."

In 1793, when that statute was adopted (1 Stat. 334), courts of equity had a well-recognized power to issue writs of injunction to stay proceedings pending in court,—in order to avoid a multiplicity of suits, to enable the defendant to avail himself of equitable defenses and the like. It was also true that the courts of equity of one State or country could enjoin its own citizens from prosecuting suits in another State or country. *Cole* v. *Cunningham*, 133 U. S. 107. This, of course, often gave rise to irritating controversies between the courts themselves

which could, and sometimes did, issue contradictory injunctions.

On principles of comity and to avoid such inevitable conflicts the act of 1793 was passed. *Diggs* v. *Wolcott*, 4 Cranch, 179, 180 (1807) and *Hull* v. *Burr*, 234 U. S. 712 (1914), (the first and last cases in this court dealing with that question) furnish typical instances in which the statute has been applied. Those decisions, and the authorities therein cited, show that although the facts might have been such as to warrant an injunction against a suit then pending in a state court, yet § 720 prevented the Federal court from staying the proceedings in the state court.

3. But when the litigation has ended and a final judgment has been obtained—and when the plaintiff endeavors to use such judgment—a new state of facts, not within the language of the statute may arise. In the nature of the case, however, there are few decisions dealing with such a question. For where the state court had jurisdiction of the person and subject-matter the judgment rendered in the suit would be binding on the parties until reversed and there would therefore usually be no equity in a bill in a Federal court seeking an injunction against the enforcement of a state judgment thus binding between the parties. See *Marshall* v. *Holmes*, 141 U. S. 600, where *Nougué* v. *Clapp*, 101 U. S. 551, relied on by Appellant, is discussed.

There have, however, been a few cases in which there was equity in the bill brought to enjoin the plaintiff from enforcing the state judgment, and where that equity was found to exist appropriate relief has been granted. For example, in *Julian* v. *Central Trust Company*, 193 U. S. 112, a judgment was obtained in a state court, execution thereon was levied on property which, while not in possession of the Federal court, was in possession of a purchaser who held under the conditions of a Federal decree. It

SIMON v. existence of that equity authorized an
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Holmes, Sheriff, from levying Mayer's judgments alleged to be fraudulent. Her petition for removal to the United States court was denied and the case proceeded to final hearing in the state court where the temporary injunction was dissolved. That decree was affirmed by the Supreme Court of Louisiana. The case was then brought here to review the order refusing to allow the case to be removed to the Federal court. In discussing that issue the Appellee contended that 'it was not competent for the Circuit Court of the United States, by any form of decree, to deprive Mayer of the benefit of his judgment at law, and that Mrs. Marshall could obtain the relief asked only in the court in which the judgment had been rendered.' In considering that contention (which is substantially the same as that urged by the Appellant Simon here), the court asked 'whether, where the requisite diversity of citizenship existed, the Circuit Court of the United States could not deprive a party of the benefit of a judgment fraudulently obtained by him in a state court?' In answering this question the court pointed out the difference between enjoining a court and enjoining a party; and the difference between setting aside a judgment for irregularity and setting it aside for fraud. It was held that the case was removable, since, there being diversity of citizenship, the Circuit Court of the United States had jurisdiction to award Mrs. Marshall protection by preventing the plaintiff from enforcing his judgments if they were found to be fraudulent in fact, saying that the

"Authorities would seem to place beyond question the jurisdiction of the Circuit Court to take cognizance of the present suit, which is none the less an original, independent suit, because it relates to judgments obtained in the court of another jurisdiction. While it cannot require the state court itself to set aside or vacate the judgments in question, it may, as between the parties before it, if the facts justify such relief, adjudge that Mayer shall

not enjoy the inequitable advantage obtained by his judgments. A decree to that effect would operate directly upon him, and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in a state court. 'It would simply take from him the benefit of judgments obtained by fraud.'" And if a United States court can enjoin a plaintiff from using a judgment, proved to be fraudulent, it can likewise enjoin him from using a judgment absolutely void for want of service.

4. The Appellant Simon further contends that *Marshall* v. *Holmes*, is not applicable here because that was a removal case; and it is urged that even if a Federal court can grant an injunction in a case removed, it cannot award the same relief in a bill originally brought in the Federal court. But that is a clear case of distinction without a difference and was not the basis of the decision.

Indeed (excluding ancillary bills *Traction Company* v. *Mining Company*, 196 U. S. 245), it seems always to have been assumed that the prohibition of § 720 applied to cases removed to the United States courts, as well as to those originally instituted therein. Such was true in *Diggs* v. *Wolcott*, 4 Cranch, 179, the first reported case arising under the law. There a bill in Chancery was filed in a Connecticut court to enjoin a suit then pending in a Connecticut court. The case was removed to the United States Circuit Court and after removal the injunction was granted. On appeal the decree was reversed on the ground that a United States court could not [even on removal] "stay proceedings in a state court." In later decisions it has been pointed out that if there was a difference between cases brought and those removed, it would have been easy, as the law then stood, for the nonresident to bring a suit for injunction in a state court, remove it to the Federal court, secure therein the injunction sought, and thus evade

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Truerry, 36 Fed. Rep. 337 cited in *Julian* v. *Central*
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the e fruits of a fraudulent judgment, nor prevent
whi ourts from enjoining a party from using that
a n s a judgment but which is, in fact and in law,
Fe y. That conclusion is inevitable, or else the
of t must hold that a judgment—void for want
the "a proceeding in a state court" even after
has l litigation has ended and the void judgment
tra ained. Such a ruling would involve a con-
th terms, and treat as valid for some purposes
for e courts have universally held to be a nullity
U es.

to there was equity in the bill, and if the
ve court had jurisdiction of a suit brought
se laintiff from using a judgment alleged to be
m f fraud in its procurement and for want of
al defendant, it becomes necessary to deter-
the Railway Company established the
wts bill.

t found as a fact that the Southern Railway
n business within the State of Louisiana; that
s no fraud in the procurement of the judg-
I t the service on the *Assistant* was not the
Secretary of State required by the statute.
ecommended that a decree be entered en-
ntiff from using the judgment obtained in

the District Court of the Parish of Orleans. The Circuit Court made no finding on the question of fraud, but ruled (184 Fed. Rep. 959) that the service was void because Act 54 was unconstitutional in that it contained no provision requiring the Secretary of State to give the foreign corporation notice that suit had been brought and citation served. In support of that construction it quoted at length a statement of the Supreme Court of Louisiana in *Gouner* v. *Missouri Valley Bridge Co.*, 123 Louisiana, 964. In that case service was made on the Secretary of State after the foreign corporation sued had left the State. As the court held that the statute did not apply to such absent corporation it did not finally pass on the validity of Act 54 under the state constitution, though it did say:

"This law makes no provision whatever for the service on the defendant. The officer may decline to communicate with the person sued and give no notice whatever; not even by mail. A judgment might be obtained without the least knowledge of the person sued. Under the phrasing of the statute, the duty of the officer begins and ends in his office. If such a judgment were rendered, it could receive no recognition whatever at the place of the domicile. When a petition cannot legally be served on a defendant, the court can exercise no jurisdiction over him. The service defines the court's jurisdiction."

On the other hand, the Circuit Court of Appeals (195 Fed. Rep. 56), while referring to this case, held, citing *Amy* v. *Watertown*, 130 U. S. 317, that though the Southern Railway was doing business in Louisiana, yet the default judgment was void because entered in a suit served on the *Assistant* when the statute designated the Secretary of State as the officer upon whom the citation should be served.

The broader the ground of the decision here, the more likelihood there will be of affecting judgments held by persons not before the court. We therefore purposely

refrain from passing upon either of the propositions decided in the courts below, and without discussing the right to sue on a transitory cause of action and serve the same on an agent voluntarily appointed by the foreign corporation, we put the decision here on the special fact, relied on in the court below, that in this case the cause of action arose within the State of Alabama, and the suit therefor, in the Louisiana court, was served on an agent designated by a Louisiana statute.

Subject to exceptions, not material here, every State has the undoubted right to provide for service of process upon any foreign corporations doing business therein; to require such companies to name agents upon whom service may be made; and also to provide that in case of the company's failure to appoint such agent, service, in proper cases, may be made upon an officer designated by law. *Mutual Reserve Ass'n* v. *Phelps*, 190 U. S. 147; *Mutual Life Ins. Co.* v. *Spratley*, 172 U. S. 603. But this power to designate by statute the officer upon whom service in suits against foreign corporations may be made relates to business and transactions within the jurisdiction of the State enacting the law. Otherwise, claims on contracts wherever made and suits for torts wherever committed might by virtue of such compulsory statute be drawn to the jurisdiction of any State in which the foreign corporation might at any time be carrying on business. The manifest inconvenience and hardship arising from such extra-territorial extension of jurisdiction, by virtue of the power to make such compulsory appointments, could not defeat the power if in law it could be rightfully exerted. But these possible inconveniences serve to emphasize the importance of the principle laid down in *Old Wayne Life Association* v. *McDonough*, 204 U. S. 22, that the statutory consent of a foreign corporation to be sued does not extend to causes of action arising in other States.

In that case the Pennsylvania statute, as a condition of

their doing business in the State, required foreign corporations to file a written stipulation agreeing "that any legal process affecting the Company served on the Insurance Commissioner . . . shall have the same effect as if served personally on the Company within this State" (18). The Old Wayne Life Association having executed and delivered, in Indiana, a policy of insurance on the life of a citizen of Pennsylvania (20) was sued thereon in Pennsylvania. The declaration averred that the Company "has been doing business in the State of Pennsylvania, issuing policies of life insurance to numerous and divers residents of said County and State," and service was made on the Commissioner of Insurance. The Association made no appearance and a judgment by default was entered against it. Thereafter suit on the judgment was brought in Indiana. The plaintiff there introduced the record of the Pennsylvania proceedings and claimed that, under the full faith and credit clause of the Constitution, he was entitled to recover thereon in the Indiana court. There was no proof as to the Company having done any business in the State of Pennsylvania, except the legal presumption arising from the statements in the declaration as to soliciting insurance in that State. This court said:

"But even if it be assumed that the Company was engaged in *some* business in Pennsylvania at the time the contract in question was made, it cannot be held that the Company agreed that service of process upon the Insurance Commissioner of that Commonwealth would alone be sufficient to bring it into court in respect of all business transacted by it, no matter where, with or for the benefit of citizens of Pennsylvania (21). . . . Conceding, then, that by going into Pennsylvania, without first complying with its statute, the defendant Association may be held to have consented to the service upon the Insurance Commissioner of process in a suit brought against it there in respect of business transacted by it

in that Commonwealth, such assent cannot properly be implied where it affirmatively appears, as it does here, that the business was not transacted in Pennsylvania. . . . As the suit in the Pennsylvania court was upon a contract executed in Indiana; as the personal judgment in that court against the Indiana corporation was only upon notice to the Insurance Commissioner, without any legal notice to the defendant Association and without its having appeared in person, or by Attorney, or by agent in the suit; and as the act of the Pennsylvania court in rendering the judgment must be deemed that of the State within the meaning of the Fourteenth Amendment, we hold that the judgment in Pennsylvania was not entitled to the faith and credit which, by the Constitution, is required to be given to the . . . judicial proceedings of the several States, and was void as wanting in due process of law."

From the principle announced in that case it follows that service under the Louisiana statute, would not be effective to give the District Court of Orleans jurisdiction over a defendant as to a cause of action arising in the State of Alabama. The service on the Southern Railway, even if in compliance with the requirements of Act 54, was not that kind of process which could give the court jurisdiction over the person of the defendant for a cause of action arising in Alabama. As the Company made no appearance the default judgment was void. Being void the plaintiff acquired no rights thereby and could be enjoined by a Federal court from attempting to enforce what is a judgment in name but a nullity in fact. This conclusion makes it unnecessary to consider whether the Southern Railway was doing business in Louisiana. It also makes it unnecessary to consider the question of fact as to whether the judgment was void because of fraud in its procurement.

The decree of the Circuit Court of Appeals must be

Affirmed.